Supreme Court, U.S.
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No.

In the Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,

Petitioners,

v.

MARIANA J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This interpleader action was brought to settle ownership of assets misappropriated by Ferdinand Marcos when he was President of the Republic of the Philippines. The assets are claimed both by the Republic, which under Philippine law is the owner of property acquired though the misuse of public office by Philippine officials, and by a class of private judgment creditors of the Marcos estate. The Republic was dismissed from the action on sovereign immunity grounds. In the Republic's absence, however, the district court held that the Republic is not an indispensable party to the action under Fed. R. Civ. P. 19(b), proceeded to resolve the interpleader action, and awarded the disputed assets to the class of private claimants. The Ninth Circuit affirmed. The case presents the following question:

Whether a foreign government that is a "necessary" party to a lawsuit under Rule 19(a) and has successfully asserted sovereign immunity is, under Rule 19(b), an "indispensable" party to an action brought in the courts of the United States to settle ownership of assets claimed by that government.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that the Philippine National Bank (PNB) is a publicly traded corporation, in which the Republic of the Philippines has a minority ownership interest. PNB has no parent corporation and no publicly held company owns 10% or more of its stock. Arelma, S.A., which has been incorrectly referred to as Arelma Inc. throughout this litigation, is a Panamanian corporation whose shares are held in escrow by PNB. The Republic of the Philippines and the Philippine Presidential Commission on Good Government, as governmental entities, are exempt from Rule 29.6.

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OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-11a, 12a-20a, and 21a-29a) are reported at 464 F.3d 885, 448 F.3d 1072, and 446 F.3d 1019. The final order of the court of appeals denying petitioners' rehearing petition (App., *infra*, 61a-62a) is reported at 467 F.3d 1205. The orders of the district court regarding indispensability (App., *infra*, 55a-60a) and granting final judgment (App., *infra*, 43a-54a) are unreported.

JURISDICTION

After twice revising its opinion, the court of appeals entered its judgment on September 12, 2006, and denied a timely petition for rehearing on November 3, 2006. On January 24, 2007, Justice Kennedy extended the time for filing the petition for a writ of certiorari to March 5, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULES PROVISION INVOLVED

Relevant portions of Rule 19 of the Federal Rules of Civil Procedure are reproduced at App., *infra*, 63a-64a.

STATEMENT

This case is an interpleader action brought to determine ownership of a portion of the assets stolen by Ferdinand E. Marcos while he was President of the Republic of the Philippines. The Republic claims the assets, to which it is entitled under Philippine law. The assets also are claimed by, among others, a class of plaintiffs who were injured by Marcos during his presidency and who obtained a judgment against the Marcos estate in an earlier, unrelated suit. The Republic successfully asserted its sovereign immunity and was dismissed from the interpleader action. In the Republic's absence, however, the district court held that the Republic is not an indispensable party under Fed. R. Civ. P. 19(b), adjudicated the interpleader suit, and awarded the assets in their entirety to the class of Marcos creditors. The Ninth Circuit affirmed, holding that the Republic's sovereign immunity did not bar

the suit from proceeding or prevent disposition of the assets claimed by the Republic.

The Ninth Circuit's holding is one of exceptional practical and doctrinal importance. By announcing a rule that permits the award of property claimed by a foreign government even when that government is absent from the litigation by virtue of its invocation of immunity, the decision below substantially undercuts the vital interests served by the doctrine of foreign sovereign immunity, threatening to cause considerable friction in the United States' relations with other nations. The analysis used by the Ninth Circuit to adopt that rule also conflicts with the holdings of this Court and other courts of appeals regarding Rule 19(b), injecting confusion and uncertainty into an important area of the law. And the Ninth Circuit's disposition of this case – awarding to private parties property that was stolen from the Republic by its former President and that is the subject of ongoing forfeiture litigation in the Philippines – directly interferes with the vital national interests of an important ally of the United States. Review by this Court accordingly is warranted.

1. In 1986, a popular uprising – the "people power" revolution – overthrew Ferdinand Marcos as President of the Republic of the Philippines. Under Philippine law, assets derived from misuse of public office are forfeit to the Republic from the moment they are generated (see ER 0102-1014), and the Republic accordingly set out to recover the vast sums stolen by Marcos during his 20-year tenure as President. As her first act in office, the Republic's new President, Corazon Aquino, created the Philippine Presidential Commission on Good Government (PCGG), which was given responsibility for locating and recapturing assets that had been wrongfully acquired by Marcos. Reclaiming assets misappropriated by Marcos was and is one of the Philippine government's most urgent priorities: the Republic recently sent a diplomatic note to the United States Department of State regarding this litigation, identifying the "recovery of [Marcos's] ill-gotten

wealth" as "a preeminent responsibility of the Philippine government" that "represents a national interest of the Republic that is of the highest order." App., *infra*, 65a.

The PCGG's mission took it to Switzerland, where Marcos had secreted much of his misappropriated property. At the PCGG's request, the Swiss government froze Marcos-related assets pending the outcome of civil and criminal proceedings against Marcos in the Philippines. Ultimately, because there was no reasonable doubt that Marcos had obtained his Swiss assets illegally, the Swiss Federal Supreme Court held in 1997 and 1998 that the assets should be transferred to an escrow account at the Philippine National Bank (PNB). See *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc, et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997).[1] The Swiss court conditioned these transfers on the Republic's guaranteeing that the eventual allocation of the assets would be made in accordance with the outcome of Philippine judicial proceedings between the Philippine government and the Marcos family estate. See *id.* at 10. The PCGG and PNB accordingly entered into escrow agreements obligating PNB to dispose of the repatriated property as directed by a final judgment of the appropriate Philippine court determining the assets' rightful owner.

In the Philippines, the PCGG in 1991 brought a forfeiture action regarding the Swiss assets before the Sandiganbayan, an anti-corruption court with exclusive jurisdiction to resolve issues relating to property allegedly pilfered by Marcos. Ct. App. ER 0106, 0174-0251. Marcos's widow, Imelda Marcos, and the Marcos estate have been fully represented in these proceedings. In 2000, the Sandiganbayan ruled for the

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[1] See also *In re Aguamina Corp.*, No. 1A.31, 41/1998 (Swiss Fed. Sup. Ct. Mar. 12, 1998); *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997 (Swiss Fed. Sup. Ct. Jan. 7, 1998); *Fed. Police Dept.* v. *Aguamina Corp.*, No. 1A.87/1997 (Swiss Fed. Sup. Ct. Dec. 10, 1997).

PCGG, holding that the Swiss assets belong to the Philippines. The Sandiganbayan subsequently set aside its judgment on technical grounds, but the Philippine Supreme Court reversed, ruling in the PCGG's favor. *Republic of the Phil.* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003).

2. This case involves a dispute about ownership of a subset of the Marcos assets sent by Swiss authorities to be held in escrow by PNB. In 1972, Marcos created and transferred $2 million to Arelma, S.A., a Panamanian stock corporation with two outstanding shares that, prior to 1998, were held in Switzerland. Arelma invested the funds with Merrill Lynch, Pierce, Fenner & Smith, Inc., in New York, and by 2000 that investment had grown to approximately $35 million. Following the initial freeze of Marcos-related property in 1986, Swiss authorities identified Arelma as a repository for Marcos's assets; Swiss police officials subsequently included Arelma's share certificates among the assets transferred to PNB to be held in escrow pending final determination of ownership by the Philippine courts.[2]

When the PCGG brought its forfeiture action before the Sandiganbayan, it specifically listed Arelma and the Merrill Lynch account as the product of illegal activity that have at all times belonged to the Philippine government. ER 0106, 0174-0251. Although the Philippine Supreme Court's decision in the forfeiture proceeding unequivocally favored the Republic's legal claim regarding Marcos's Swiss property, it did not expressly mention the Arelma assets. The PCGG therefore filed a motion before the Sandiganbayan seeking a clarification that the Arelma assets indeed were forfeit to the Republic. That litigation, which will conclusively determine ownership of the Arelma assets as a matter of Philippine law,

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[2] That transfer made PNB the sole shareholder of Arelma, with exclusive authority under Panamanian law to elect officers and directors and to determine the disposition of the corporation's assets.

is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court.

3. While the Marcos-related litigation was pending in the Philippine courts, the PCGG asked Merrill Lynch to surrender the Arelma assets to PNB, to be held in escrow pending final determination of ownership. Merrill Lynch declined to do so, "apparently because of the existence of other claimants" (App., *infra*, 31a) – most notably, a class of thousands of victims of the Marcos regime ("the Pimentel class") who had obtained a near-$2 billion judgment against the Marcos estate in the U.S. District Court for the District of Hawaii. See *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). Evidently at the direction of Judge Real, the district judge who had presided over the Pimentel class action, Merrill Lynch ultimately initiated this interpleader suit in the District of Hawaii to resolve competing claims to the Arelma assets.[3] The named defendants in the action came to include the Republic; the PCGG; PNB; Arelma; Marcos heirs and others who assert a right to act for Arelma; and judgment creditors of the Marcos estate, among them the Pimentel class. See App., *infra*, 31a.

The Republic and the PCGG sought dismissal of the interpleader action. As a foreign sovereign and its instrumentality, they asserted sovereign immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. And invoking Federal Rule of Civil Procedure 19, they maintained that their unavailability required dismissal of the action. They were "necessary" parties to the suit within the

[3] Merrill Lynch initially stated that it would await the outcome of the Sandiganbayan proceedings before turning the Arelma assets over to anyone. ER0393-0395. When the Pimentel class asserted ownership of the assets, however, Judge Real directed Merrill Lynch to appear before him and instructed the firm to commence an interpleader proceeding not in New York, where Merrill Lynch is headquartered and where the funds were held, but in Hawaii. ER0031-ER0032.

meaning of Rule 19(a)(2), they argued, because adjudication of the interpleader action would impair their ability to protect their claim to the Arelma assets. And they were "indispensable" parties within the meaning of Rule 19(b), they continued, because resolution of the interpleader action effectively would render meaningless their assertion of immunity by resolving ownership of assets in which they had an interest. Accordingly, they concluded, the suit could not proceed in their absence. See App., *infra*, 31a-32a.

The district court disagreed. Rather than address the Republic's claim of sovereign immunity, the court effectively ruled against the Republic and the PCGG *on the merits*, holding that they were "not real parties in interest" in the interpleader action. See App., *infra*, 32a. Judge Real dismissed the Republic and the PCGG from the suit on that ground, held that they were neither necessary nor indispensable parties under Rule 19 because they had no enforceable claim to the Arelma assets, and enjoined them from bringing further actions in the United States to pursue the assets. See *id.* at 32a-33a. The Republic and the PCGG appealed.

The Ninth Circuit reversed. App., *infra*, 30a-42a. It held that since "the Republic and PCGG are immune from suit under the FSIA * * * the district court should have granted their motion to dismiss them on that ground." *Id.* at 39a. Given that immunity, the district court had no authority to inquire into the merits of their claim. Turning to Rule 19 and disposition of the interpleader action, the court determined that the Republic and the PCGG are "necessary" parties under Rule 19(a) who should participate in the action "if feasible" because they have a claim to the assets at issue in the litigation – a claim the court labeled "substantial." *Id.* at 41a. In addition, the Ninth Circuit noted that, "[g]iven the inability of the court to resolve the claims of the Republic and the PCGG, it is difficult to see how the interpleader action can proceed in their absence" under Rule 19(b). *Ibid.* Rather than dismiss the action outright, however, the court, with the con-

sent of the Republic and the PCGG, ordered that it be stayed pending resolution of litigation in the Philippines regarding ownership of the Arelma assets. *Id.* at 42a.

4. On remand, the district court promptly dissolved the stay. Judge Real ruled that the Republic and the PCGG, now absent from the litigation because they had been dismissed on sovereign immunity grounds, were not indispensable parties within the meaning of Rule 19(b). App., *infra*, 55a-60a. The court so held by, again, addressing the merits of the Republic's position, ruling this time that the Republic and the PCGG have "no legally protectible interest in the assets at issue in this proceeding" because any claim they brought for the Arelma funds held by Merrill Lynch in the United States would be time-barred. *Id.* at 57a. Without the participation of the Republic or PCGG, the court proceeded to adjudicate entitlement to the Arelma assets, awarding them in their entirety to the Pimentel class. *Id.* at 43a-54a.

5. The Ninth Circuit affirmed. App., *infra*, 1a-11a, 12a-20a, 21a-29a. In its initial opinion (*id.* at 21a-29a), the court began by opining that the indispensability test of Rule 19(b) is shaped by considerations of "fairness and the moral weighing that should attend the judge's choice of solutions." *Id.* at 25a. Applying this standard, the court reasoned that sovereign immunity is a "powerful consideration" in determining whether suit may go forward under Rule 19 in a sovereign's absence, but "is not the sole consideration." *Id.* at 26a.

Surveying the other factors that related to the "moral weighing" it believed relevant to the determination of indispensability, the Ninth Circuit noted that many years had gone by since the Arelma assets were placed in escrow and "the Republic has not obtained a judgment that the assets in dispute belong to it." Although the court did "not hold the Republic guilty of laches" – it hardly could have, as the PCGG has been diligently pursuing Marcos's assets around the world and in the Philippine courts throughout that period – the court regarded the Republic's "failure to secure a judg-

ment affecting these assets" as an equitable "factor to be taken into account." App., *infra*, 26a. The court also "note[d] the presence in this action of victims of the former president of the Republic," asking: "In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?" *Id.* at 27a. The court thought not. As a "final consideration," the court echoed Judge Real's view that resolution of the interpleader suit would not harm the Republic because the New York statute of limitations would bar any effort to obtain the Arelma assets from Merrill Lynch, so that, "[r]ealistically, we cannot envision a lawsuit in which the Republic will prevail." *Id.* at 28a. These considerations led the court to conclude that the Republic is not an indispensable party to the interpleader action.[4]

6. The Republic and the PCGG sought rehearing, arguing that "moral weighing" is not the standard established by Rule 19(b). In response, the panel withdrew its opinion and substituted a new one. App., *infra*, 1a-11a. The revised decision removed the reference to "moral weighing" and was restructured to address directly the criteria identified in Rule 19(b), but it substantially incorporated the reasoning of the initial decision. It thus reaffirmed the holding that the Republic and the PCGG are not indispensable parties, and it awarded the Arelma assets to the Pimentel class.

Accepting that the Republic and the PCGG are "necessary" parties under Rule 19(a) (App., *infra*, 5a), the Ninth Circuit began with the term "equity and good conscience," which is part of the Rule 19(b) test. The court opined that, "in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and 'good

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[4] Several days later, the court of appeals issued a revised opinion that was amended in ways that are not material here. App., *infra*, 12a-20a.

conscience' referred to an interior moral arbiter regarded as the voice of God." App., *infra*, 6a. The court concluded that the terms had more recently been "domesticated" and taken on "a secular rather than a religious cast," but nevertheless believed that their use in Rule 19 "emphasizes the flexibility that a judge may find necessary in order to achieve fairness in the judge's choice of solutions." *Ibid.*

The Ninth Circuit then turned to the considerations identified in the text of Rule 19(b) as relevant to the indispensability inquiry. Although the court reiterated that sovereign immunity generally is a "powerful consideration," it found the Republic's immunity entitled to no weight in this case because, "[t]o protect a party as indispensable, Rule 19 requires an interest that will be impaired by the litigation as a practical matter." App. *infra*, 7a (citation and internal quotation marks omitted). The court believed that the Republic had no such interest here because, "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Ibid.* That is so, the court reasoned, because an action by the Republic to recover the assets held by Merrill Lynch in the United States would be time-barred. *Id.* at 8a. The court thought it immaterial that claims brought by the Republic in the Philippine courts seeking recapture of assets stolen by Marcos are *not* subject to a statute of limitations, reasoning that "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States. If a Philippine court were to issue such a decree, a court of this country would not be bound to give it effect." *Ibid.*

For similar reasons, the Ninth Circuit found it irrelevant that the district court's judgment did not contain provisions designed to protect the Republic's interest; "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it." App., *infra*, 9a. The court also reasoned that a judgment for the Pimentel class issued in the Republic's absence would be

"adequate" because "the symbolic significance of some tangible recovery [for the class] is not to be disregarded." *Ibid.* The court was not persuaded by the argument that Marcos's victims "should find redress from their own government" because, it believed, "the Republic has not taken steps to compensate those persons who suffered outrage from the extralegal acts of a man who was President of the Republic." *Id.* at 9a-10a. The court also stated that the Pimentel class has "no forum within the Philippines open to their claims." *Id.* at 10a.

In holding that the Republic and the PCGG are not indispensable and affirming the judgment for the Pimentel class, the Ninth Circuit recognized that the Arelma "assets may be distributed after judgment here and be beyond recapture," so that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." App., *infra*, 8a-9a. But the court did not regard that reality as relevant because it believed that the Republic's legal claim to the assets ultimately would not be successful. Thus, the court concluded, "[n]o injustice is done if [the Republic] now loses what it can never effectually possess." *Id.* at 10a.

The court of appeals subsequently denied a renewed petition for rehearing filed by the Republic. In doing so, it reiterated its view that that the Republic could not enforce a Philippine judgment awarding it the Arelma assets because "[t]he Republic has no jurisdiction over the *rem* [*sic*], which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States." App., *infra*, 61a. The Ninth Circuit also restated its view that suit may proceed under Rule 19(b) even in the absence of a necessary party that asserts sovereign immunity. The court recognized that "'some courts have held that sovereign immunity forecloses in favor of [the sovereign] the entire balancing process under Rule 19(b).'" But the Ninth Circuit rejected that approach, instead "'follow[ing] the four-factor process even with immune [entities].'" *Id.* at 61a-62a (citation omitted).

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision went badly astray on several levels. Its holding that litigation over the ownership of assets claimed by a sovereign may proceed to judgment in the sovereign's absence eviscerates the sovereign immunity doctrine and substantially undercuts the important public interests served by the immunity principle. The court compounded its error by basing its ruling on a finding that the sovereign's claim lacks merit, the very sort of determination that sovereign immunity is meant to foreclose. And the decision below also departed more broadly from proper application of the Rule 19(b) standards, misstating the requirements of the Rule and producing a conflict in the lower courts on a recurring issue of considerable significance.

Perhaps most fundamentally, the court of appeals' holding effectively precludes the Republic from recovering assets stolen by its former President, short-circuiting litigation now pending in the Philippine courts and interfering with one of the Republic's essential interests. This aspect of the Ninth Circuit's ruling threatens to disrupt international cooperation in combating official corruption, may prompt retaliation by foreign governments or make foreign tribunals reluctant to enforce the judgments of United States courts, and – not least – will cause substantial friction in the United States' relationship with an important ally.[5] The judgment below accordingly should not stand.

A. The Decision Below Undermines Important Principles Of Sovereign Immunity And Departs From The Standards That Govern Rule 19(b)

The framework for resolution of this case is set by Fed.

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[5] The decision also places PNB, the nominal owner of Arelma, in an untenable position because the bank is a party to escrow agreements, entered into at the direction of the Swiss Federal Supreme Court, requiring it to dispose of the Arelma assets as directed by the appropriate *Philippine* court.

R. Civ. P. 19. Under Rule 19(a)(2)(i), an entity must be joined to an action as a party – in common parlance, the entity is a "necessary" party – if it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest." As the Ninth Circuit itself recognized, the Republic and the PCGG plainly satisfy that test. App., *infra*, 5a, 40a.

The crux of the legal issue here is found at the next step of the inquiry, in Rule 19(b). That element of the Rule provides that, if an entity described in Rule 19(a) cannot be made a party – which the Ninth Circuit again agreed is the case here, given the sovereign immunity of the Republic and the PCGG – "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." The Rule offers four nonexclusive factors that may be considered in guiding this decision: (1) "to what extent a judgment issued in the person's absence might be prejudicial to the person"; (2) the extent to which, by use of protective provisions in the judgment, "the prejudice can be lessened or avoided"; (3) "whether a judgment rendered in the person's absence will be adequate"; and (4) "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Under this regime, a party is labeled "indispensable" once the court concludes that the case should not proceed in the party's absence. As Justice Harlan explained for a unanimous Court in the leading decision on Rule 19(b):

> [t]he decision whether to dismiss (*i.e.*, the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it

> merely commands the courts to examine each controversy to make certain that the interests really exist.

Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102, 118-119 (1968). For several reasons, the Ninth Circuit's application of these principles was fundamentally flawed.

1. A Case Must Be Dismissed Under Rule 19(b) When A Necessary Party Has Sovereign Immunity

a. To begin with, the Ninth Circuit departed from principles regarded as fundamental by this Court when it failed to recognize that the sovereign immunity of a "necessary" party is one of those "substantive" factors that are "compelling by themselves" (*Provident*, 390 U.S. at 118-119) and that, without more, *require* dismissal of the action under Rule 19(b). Since Revolutionary times, it has been thought "'inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind.'" *Fed. Maritime Comm'n* v. *South Carolina State Ports Auth.*, 535 U.S. 743, 752 (2002) (quoting *The Federalist*, No. 81, at 487-488 (C. Rossiter ed. 1961) (Hamilton) (emphasis in original)). So far as foreign sovereigns are concerned, that principle was recognized "very early in our history" and "has since become part of the fabric of our law" (*Nat'l City Bank of New York* v. *Republic of China*, 348 U.S. 356, 358 (1955)), established first by this Court as a matter of common law (see *Schooner Exchange* v. *M'Fadden*, 11 U.S. (7 Cranch) 116 (1812)) and subsequently codified in the FSIA.

It has long been the position of the United States that immunity in domestic courts for foreign sovereigns serves interests of substantial public importance: "'the purpose of sovereign immunity in modern international law ... is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based on its public acts.'" *Segni* v. *Commercial Office of*

Spain, 816 F.2d 344, 347 (7th Cir. 1987) (Posner, J.) (quoting testimony of State Department Legal Advisor)) (ellipses added by the court). Such immunity is provided as a "gesture of comity between the United States and other sovereigns." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003). See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 688-689 (2004); *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 486-487 (1983). Where it applies, immunity both spares the sovereign's treasury and altogether protects it against the burden of having to engage in litigation. See, *e.g.*, *Fed. Maritime Comm'n*, 535 U.S. at 765-766.

b. As a practical matter, allowing litigation to proceed in the absence of a sovereign that claims immunity, when the sovereign is a "necessary" party under Rule 19(a), wholly vitiates that immunity. That certainly is true in the interpleader context. Interpleader actions, after all, are intended to settle definitively competing and incompatible claims to property, such as those relating to the Arelma assets at issue in this case. The Ninth Circuit itself candidly acknowledged that the litigation here will accomplish precisely that result, recognizing that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." App., *infra*, 9a. That outcome would make the Republic's assertion of immunity meaningless and wholly frustrate the compelling interests served by the immunity doctrine. See, *e.g. Enterprise Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (suit adjudicating sovereign's interest in a contract in the sovereign's absence would "effectively abrogate * * * sovereign immunity").

Allowing such a judgment to issue would do more than award to private litigants assets that are claimed by a sovereign; it also would effectively coerce the sovereign into formally surrendering its immunity and appearing in court so that it is able to defend interests that otherwise would simply be overborne without its participation. This Court made just that point in very similar circumstances in *Federal Maritime*

Commission, explaining that, when a proceeding will have the same practical effect as a judgment against a sovereign, the sovereign either "would effectively be required to defend [itself]" or would "substantially compromise its ability to defend itself at all." *Fed. Maritime Comm'n*, 535 U.S. at 762. To believe that this sort of choice does not "coerce" a sovereign into participating in litigation and waiving immunity, the Court concluded, "would be to blind ourselves to reality." *Id.* at 763-764.

Entertaining an action in the absence of a necessary party that has asserted sovereign immunity therefore is inconsistent with the immunity doctrine. In circumstances like those here, a judgment awarding assets claimed by a sovereign has the same effect on the sovereign's treasury as would a suit in which the sovereign is compelled to appear. And in the international context, awarding assets claimed by another nation to private parties, as the result of litigation in which that nation did not participate, destroys the "grace and comity" that underlies the immunity principle. After all, "[i]t is wholly at odds with the policy of [sovereign immunity] to put the [sovereign] to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

c. For just these reasons, this Court has held that a sovereign is an "indispensable" party in a suit – like this one – that "is essentially one designed to reach money which the government owns." *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945) (quoting *Louisiana* v. *Garfield*, 211 U.S. 70, 78 (1908)). Such a suit must be dismissed when the sovereign claims immunity because "the government's liability cannot be tried 'behind its back.'" *Ibid.* See *Minnesota* v. *United States*, 305 U.S. 382, 383-384 (1939) (suit to condemn land in which United States claims an interest must be dismissed when United States asserts immunity); 7 Wright, Miller, & Kane, *Federal Practice & Procedure 3d* § 1617 &

n.10 (citing *Forrestal* and *Minnesota* for proposition that, "[w]hen an interest of the federal government is involved in a suit and a judgment cannot be rendered without affecting that interest," "the United States may be regarded as an indispensable party under Rule 19 and the action dismissed").[6]

These holdings were compelled by the significance of the interests served by sovereign immunity. The importance of the immunity principle means that, "when an indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those factors compelling by themselves." *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (citations and internal quotation marks omitted). Cf. *United States* v. *United States Fidelity & Guar. Co.*, 309 U.S. 506, 513 (1940) (cross-claim against sovereign prohibited because "[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity."). In this context, requiring dismissal of a suit to preserve a foreign nation's sovereign immunity is not at all inconsistent with Rule 19(b)'s standards of "equity and good conscience"; to the contrary, the foreign sovereign immunity doctrine *itself* "deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Nat'l City Bank*, 348 U.S. at 362. The decision below cannot be squared with this understanding.

d. For its part, the Ninth Circuit did acknowledge that, "[i]n the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action." App., *infra*, 6a. Notwithstanding that proposition, however, the court immediately proceeded to conclude that, "under

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[6] Although these decisions predated Rule 19(b), the governing joinder law at the time was substantially identical to that now stated in the Rule. See *Provident*, 390 U.S. at 116 n.12 ("The new text of the Rule was not intended as a change in principles.").

Rule 19, sovereign immunity is *not* the sole consideration." *Id.* at 7a (emphasis added). For reasons we have explained, that conclusion was wrong. And the court of appeals greatly compounded its error in the remainder of its analysis: one of its principal bases for disregarding the Republic's immunity was its conclusion that the Republic's claim to the Arelma assets would fail *on the merits* if litigated. That reasoning endorsed an approach that effectively *adjudicates a claim against the sovereign* as a means of determining whether the sovereign's absence from the suit requires dismissal.

This approach rests on a basic misunderstanding of sovereign immunity. The doctrine precludes compelling a sovereign to litigate its interest in disputed assets; it surely also precludes a court from *itself* assessing the strength of the sovereign's claim in the sovereign's absence and making the outcome turn on whether, in the court's view, the sovereign is entitled to prevail on the merits. In fact, resolving the Rule 19(b) inquiry by looking at the merits of the sovereign's case actually increases the pressure on the sovereign to appear in court and participate in the litigation. The sovereign "obviously will not know *ex ante*" how the court will assess the strength of the sovereign's claim on the merits. *Fed. Maritime Comm'n*, 535 U.S. at 764 n.17. An unfavorable determination could substantially undermine the sovereign's interests by, for example, limiting the sovereign's ability to litigate the issue (or related issues) in another forum even if that otherwise would have been a possibility. That reality would "coerce[] [the sovereign] to participate in [the] proceedings" for fear that, if it fails to do so, "it will have all but lost any opportunity to defend itself." *Ibid.*

The perverse effect of the Ninth Circuit's approach is reflected by what happened in this case: the only consequence of the Republic's and the PCGG's invoking their immunity was that they were not present to protect themselves when their interests were determined. Needless to say, litigation about the merits of an absent party's claim, which will pro-

ceed without a full adversary presentation on the issues, may well come to the wrong conclusion. That happened here: the Ninth Circuit was incorrect in its belief that a Philippine judgment awarding the Arelma assets to the Republic would be unenforceable in the United States.[7] Moreover, permitting the case to proceed in the sovereign's absence denies the sovereign an opportunity to fully litigate other grounds on which dismissal might be appropriate. In this case, for example, there were powerful arguments that the suit should have been dismissed on grounds of comity, act of state, or forum non conveniens, all of which were ignored by the courts below.[8] For this reason as well, a court's non-litigated assess-

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[7] The Ninth Circuit reasoned that the Philippine courts regard the action here as one *in rem*, that the Republic has no jurisdiction over the *res*, and that "any judgment made without proper jurisdiction is unenforceable in the United States." App., *infra*, 61a. In fact, the Philippine Supreme Court, in the very decision relied upon by the Ninth Circuit, indicated that the corporations used to shield Marcos' assets are *themselves* "the *res*" (*Rep. of the Phil. v. Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003), at 50 – making *the Arelma shares*, which are being held by PNB in the Philippines, the *res* at issue here. Moreover, the Philippine Supreme Court also declared that it *did* have jurisdiction over funds transferred from Switzerland. *Rep. of the Phil. v. Honorable Sandiganbayan*, G.R. No. 152154 (Phil. Nov. 18 2003), at 11 ("We take judicial notice of newspaper accounts that a certain Judge Manuel Real of the US District Court of Hawaii issued a 'global freeze order' on the Marcos assets, including the Swiss deposits. We reject this order outrightly because it is a transgression not only of the principle of territoriality in public international law but also of the jurisdiction of this Court recognized by the parties-in-interest and the Swiss government itself."). And when enforcing foreign judgments, courts in the United States (with limited exceptions not relevant here) assume subject matter jurisdiction. *Restatement (Third) of Foreign Relations Law* § 482 cmt a, cmt d (1987).

[8] The Republic and the PCGG raised each of those grounds in the district court and noted them in their briefing to the Ninth Circuit.

ment of the merits is not an adequate substitute for dismissal of the action on the basis of sovereign immunity. The Ninth Circuit's contrary conclusion should be set aside.

2. *The Ninth Circuit's Ruling Conflicts With The Decisions Of Other Courts Of Appeals, Which Have Held That A Sovereign Asserting Immunity Is An Indispensable Party Under Rule 19(b)*

Given the Ninth Circuit's departure from principles announced by this Court, it is not surprising that the holding below conflicts with the decisions of other courts of appeals. Indeed, the Ninth Circuit's denial of rehearing in this case itself candidly acknowledged that conflict: "'some courts have held that sovereign immunity forecloses in favor of [the sovereign] the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune [entities]." App., *infra*, 61a-62a (citation omitted). See *Dawavendewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002) (citations and internal quotation marks omitted) (although "[c]ognizant of these out-of-circuit decisions, the Ninth Circuit has, nonetheless, consistently applied the four-part balancing test to determine whether [sovereigns] are indispensable parties."). In this, at least, the Ninth Circuit was correct: its holding departs from that of other courts of appeals.

In a decision issued shortly after Rule 19 took effect, for example, the First Circuit addressed a suit seeking funds owed to the United States. Writing for the court, Judge Coffin explained that "[a] judgment for the appellant would necessarily be based on a holding that the United States had no right in the fund. Thus, the United States is an indispensable

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CA9 Br. 44-46. As non-participants in the underlying action following the Ninth Circuit's recognition of their immunity in the original appeal, however, they did not have an opportunity to address the issues in any detail.

party to the action. * * * Since the United States is not and cannot be joined as a defendant, the action cannot proceed." *Am. Guaranty Corp.* v. *Burton*, 380 F.2d 789, 791 (1st Cir. 1967). The court saw no need to consider the Rule 19(b) balancing test.

The Second Circuit likewise held tribal immunity dispositive in *Fluent*. The court found "very little room for balancing of other factors set out in [r]ule 19(b), because immunity may be viewed as one of those interests compelling by themselves." 928 F.2d at 548 (citations and internal quotation marks omitted; brackets added by the court). The court added that "[t]he rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one 'where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield [sovereigns] from suit without * * * consent.'" *Ibid.* (quoting *Wichita*, 788 F.2d at 777). The existence of sovereign immunity thus made it unnecessary for the court to balance the Rule 19(b) factors. See also *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48-49 (2d Cir. 2004) (finding state indispensable under Rule 19(b) "in light of the significance sovereign immunity plays in weighing the Rule 19(b) factors").

The District of Columbia Circuit took a similar approach in *Wichita & Affiliated Tribes*, where a sovereign Indian tribe was a necessary party. The court there did look at each of the Rule 19(b) factors. See 788 F.2d at 774-778. But it found the balance tipped decisively in favor of a finding of indispensability by the Tribe's immunity. The court concluded that the Tribe's ability to intervene in the action could not be treated as diminishing prejudice to it because that "would be wholly at odds with the policy of tribal immunity." *Id.* at 776. It held that provisions in the judgment limiting relief could not be thought to guard against prejudice when those provisions would "allow tribal immunity to be avoided." *Ibid.* And the court concluded that, although other parties would not have

an adequate alternative remedy if the suit were dismissed, that "result is less troublesome in this case than in some others" because "[t]he dismissal of this suit is mandated by the policy of tribal immunity." *Id.* at 777.

Other courts of appeals, to be sure, have reasoned that balancing of the Rule 19(b) factors cannot be "completely avoided simply because an absent person is immune from suit." *Davis* v. *United States*, 343 F.3d 1282, 1293 (10th Cir. 2003). But for the most part, even these courts have recognized that sovereign immunity requires conducting the balance with a thumb on the scale favoring indispensability of the sovereign party. See *id.* at 1293-1294 ("the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit"); *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996) (same).[9] And *no* court – other than the Ninth Circuit in this case – has found it appropriate to assess the strength of the sovereign's argument on the merits in determining whether the sovereign is an indispensable party. Because the holding below accordingly creates confusion about an important and recurring question, further review is warranted.

3. The Ninth Circuit's Understanding Of The Rule 19(b) Factors Cannot Be Reconciled With The Holdings Of This Court And Other Courts Of Appeals

Review also is warranted for another reason: wholly apart from its misunderstanding of the relationship between

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[9] Some courts of appeals have applied the Rule 19(b) factors without stating that sovereign immunity is entitled to special weight, but they nevertheless have held the immune parties to be indispensable. See, *e.g.*, *Yashenko* v. *Harrah's NC Casino Co.*, 446 F.3d 541, 552-553 (4th Cir. 2006); *Keweenaw Bay Indian Cmty.* v. *Michigan*, 11 F.3d 1341, 1347-1348 (6th Cir. 1993).

sovereign immunity and Rule 19(b), the holding below misconstrued the four equitable factors specified in the Rule as bearing on indispensability. Even assuming that a balancing of the Rule 19(b) factors could be appropriate in this case, the Ninth Circuit's reading of the Rule confuses the law in material respects, departing significantly from the approach taken by this Court and other courts of appeals.

First, Rule 19(b) indicates that "the court must consider the extent to which the judgment may 'as a practical matter impair or impede [the absent party's] ability to protect' his interest in the subject matter." *Provident*, 390 U.S. at 110. There is no doubt that the Republic's and the PCGG's interest in the Arelma assets was substantially (indeed, entirely) impaired by the interpleader proceeding; the Ninth Circuit did not suggest otherwise. See 4 *Moore's Federal Practice*, § 19.05[2][d], at 19-23 (3d ed. 2006) (where there are inconsistent claims to the same assets, "prejudice from nonjoinder is virtually inescapable").

The Ninth Circuit nevertheless held that this consideration did not favor dismissal because the Republic's claim to the assets could not prevail on the merits. App., *infra*, 8a-9a. But that approach to the first Rule 19(b) factor has been flatly rejected by other courts of appeals, which have held (wholly apart from the sovereign immunity considerations discussed above) that the strength of the absent party's claim on the merits may *not* be considered under the first Rule 19(b) factor. As the Tenth Circuit put it, criticizing precisely the analysis used by the Ninth Circuit here, such an approach

> amounts to asking us to decide that the [absent party's] "interest" is not worthy of consideration because its position is wrong on the merits. But Rule 19's concern is with a "*claimed* interest." * * * "[T]he underlying merits of the litigation are irrelevant" to a Rule 19 inquiry, at least unless the claimed interest is "perfectly frivolous."

Davis, 343 F.3d at 1291 (citation omitted) (emphasis in

original). See *Tankersley* v. *Albright*, 514 F.2d 956, 965-966 (7th Cir. 1975) (inquiry "must be * * * determined prior to any consideration of the merits"). Here, the Republic's claim could not be thought "perfectly frivolous"; the Ninth Circuit itself characterized the claim as "substantial." App., *infra*, 40a. The Ninth Circuit's approach accordingly conflicts directly with that of the Tenth Circuit.

Second, Rule 19(b) directs the court to ask whether the judgment can "'be written so as to protect the legitimate interests of outsiders.'" *Provident*, 390 U.S. at 112 n.10. That plainly is impossible in a case like this, where all parties are claiming 100 percent of the same funds. See, *e.g.*, *Hall*, 100 F.3d at 480 (where all claim the same assets, there is "no way that [the court] might shape relief to lessen the potential prejudice to the [absent party]"). Again, the Ninth Circuit disregarded this consideration on the theory that, "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it." App., *infra*, 9a. But that analysis is just as wrong here as it is in relation to the first Rule 19(b) factor. As the Tenth Circuit explained, the sort of approach taken by the Ninth Circuit here is improper because "this argument goes to the merits of [the absent party's] claim, rather than the potential harm to the [absent party]" that would be caused by an unfavorable judgment. *Davis*, 343 F.3d at 1292.

Third, the Ninth Circuit found the judgment here "adequate" because, although the Arelma assets would not satisfy the Pimentel class's entire $2 billion judgment, "the symbolic significance of some tangible recovery is not to be disregarded" and pro rata distribution of the assets to the class "will have monetary meaning for the poor among them." App., *infra*, 9a. But this reasoning misunderstands the Rule 19(b) "adequacy" consideration. The Rule does not look to whether the judgment adequately compensates the plaintiffs, as the Ninth Circuit believed. Instead, this Court "read[s] the Rule's third criterion, whether the judgment issued in the ab-

sence of the nonjoined party will be 'adequate,' to refer to th[e] public stake in settling disputes by wholes, whenever possible." *Provident*, 390 U.S. at 111. Other courts of appeals have faithfully followed that guidance, looking to whether judgment in the action will dispose of *all* interests in the dispute. As the Tenth Circuit put it, "[t]he Supreme Court has explained that Rule 19(b)'s third factor is not intended to address the adequacy of the judgment from the plaintiff's point of view. * * * Rather, the factor is intended to address the adequacy of the dispute's resolution." *Davis*, 343 F.3d at 1292-1293.

The judgment here cannot satisfy the standard articulated in *Provident*. It wholly discounts the interests of the Republic and the PCGG. And it does not satisfy "th[e] public stake in settling disputes by wholes"; as the Ninth Circuit itself acknowledged, "Merrill Lynch risks being sued again" by claimants to the assets who did not participate in the litigation. App., *infra*, 10a.

At least three of the four Rule 19(b) factors therefore decisively favor dismissal of this action.[10] The Ninth Circuit's contrary decision turned on legal errors and the application of aberrant standards that have been rejected by other courts of appeals; had this case been litigated outside the Ninth Circuit, the Republic and the PCGG would have prevailed. Review by this Court is needed to bring uniformity to this important area of the law.

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[10] The fourth Rule 19(b) factor, which looks to the availability of an alternative Philippine remedy for the Pimentel class, points the same way. The dispute in the Philippines is between the Republic and the Marcos estate over ownership of the Arelma assets. The Pimentel class asserts its claim to those assets only as a creditor of the estate. It accordingly has no role to play in the litigation until the precedent question of ownership is settled as between the Republic and the estate. Questions regarding availability of a remedy for the class therefore should not arise until *after* resolution of the ongoing Philippine litigation.

B. The Decision Below Threatens To Undermine International Cooperation In Combating Official Corruption And Cause Friction In The United States' Relationship With An Important Ally

1. The Rule 19(b) issues presented here – concerning the proper treatment of sovereign immunity and the nature of the more general equitable considerations identified in the Rule – are recurring ones of substantial practical importance. Cases arising under Rule 19 tend to be significant, addressing the interests of multiple parties and absentees. See generally 4 *Moore's Federal Practice*, at § 19.02[1]. And almost by definition, disputes involving the rights of absent sovereigns concern matters of great public significance. For these reasons alone, a grant of certiorari is warranted to address the Ninth Circuit's departure from principles articulated by this Court and other courts of appeals.

There is much more to this case, however, than the technical nature of the Ninth Circuit's legal error. The need for this Court's intervention is especially acute because of the context in which this case arises: the legal rule formulated by the court of appeals, which effectively permits adjudication of the interests of nonconsenting foreign sovereigns by United States courts, inevitably will cause friction in the United States' relations with other countries. It also threatens to interfere with important international efforts to enforce criminal and civil laws combating official corruption, a matter of deep concern to the United States.[11]

The specific holding in this case, moreover, touches on a

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[11] The United States is a signatory to the United Nations Convention Against Corruption, Oct. 31, 2003, GA Res. 58/4, which makes the "return of [stolen] assets * * * a fundamental principle" (Art. 51) and obligates a state party to the Convention to "[t]ake such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party." Art. 54(1)(a).

matter of the greatest importance and sensitivity to the Philippines. In fact, it is difficult to imagine a case in which the Republic could have a more profound interest in resolution of the matter by its own courts. The Ninth Circuit interjected itself into a dispute between the Republic and its former President, over the ownership of assets stolen from the Republic during that President's tenure in office, and that also involves claims made by Philippine citizens arising out of injuries they suffered in the Philippines at the hands of the former President. As the Republic recently communicated to the State Department in a diplomatic note, the decision below, by frustrating the Philippine interest in domestic resolution of this dispute, addresses "a subject of the highest importance in maintaining respectful relations among nations." App., *infra*, 66a. Further review therefore is imperative.

2. As a general matter, there is no doubt that United States judicial decisions impinging on the interests of other nations raise matters of the greatest political sensitivity and importance. See, *e.g.*, *Verlinden*, 461 U.S. at 489. Judicial "seizure of the property of a friendly state," for example – an action that is closely analogous to the proceeding here, in which United States courts propose to distribute to third parties assets claimed by the Republic and the PCGG – "may be regarded as * * * an affront to [that state's] dignity and may * * * affect our relations with it." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35-36 (1945). The FSIA was directed at just these sorts of concerns. See, *e.g.*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., at 27 (1976) (attachment of foreign government assets "can give rise to serious friction in the United States' foreign relations" and cause "significant irritation to many foreign governments").

This case graphically illustrates the problems that may arise when United States courts adjudicate the interests of foreign sovereigns without their consent. The dispute here concerns the ownership of assets claimed by the Republic that were stolen in the Philippines by its former President.

Paramount national policy of the Republic makes recovery of those assets a matter of the greatest urgency.[12] In pursuit of that policy, the Republic and the PCGG sought and obtained the assistance of the Swiss government, achieving return of the Arelma shares to the Philippines. The Republic and the PCGG have sought to settle ownership of the Arelma assets through the Philippine court established for that purpose, litigating for more than ten years against the former President's estate; the decision of the Philippine courts in that pending litigation will determine ownership of the assets as a matter of Philippine law. Moreover, the competing claimants to the Arelma assets in the Ninth Circuit proceeding are virtually all citizens of the Philippines, which also makes *this* dispute one between the Republic and its citizens.

Against this background, the interference with the sovereign interests of the Philippines that is worked by the Ninth Circuit's judgment, as well as the likelihood that the judgment will cause significant friction in the United States' relationship with the Republic, is obvious. As a practical matter, the decision below frustrates Philippine policy regarding the recovery of misappropriated state assets. And it effectively pretermits ongoing litigation in the Philippine courts between the Republic and the estate of its former President.

Perhaps most extraordinarily, the Ninth Circuit's ruling rubs salt in the wound by relying, in part, on an express disapproval of Philippine executive and legislative policy. As one of the "equitable" considerations supporting its decision, the Ninth Circuit complained that "the Republic has not

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[12] See, *e.g.*, Phil. Exec. Order No. 1 (Feb. 28, 1986) (Pres. Corazon Aquino) ("vast resources of the government have been amassed by former President Ferdinand E. Marcos" and "there is an urgent need to recover all ill-gotten wealth"); Phil. Exec. Order No. 14 (May 7, 1986) (Pres. Corazon Aquino) ("the vital task of [the PCGG] involves the just and expeditious recovery of * * * ill-gotten wealth in order that the funds, assets, and other properties may be used to hasten national economic recovery").

taken steps to compensate those persons who suffered outrage from the extra-legal acts of a man who was president of the Republic." App., *infra* 9a-10a. Few things are more likely to cause irritation to a foreign government than an adverse judicial decision premised on a United States court's disagreement with that government's democratically implemented domestic policy.[13]

3. The Ninth Circuit's holding also frustrates policies of the Swiss government. The Swiss Federal Supreme Court authorized transfer of the Arelma shares to be held in escrow by PNB on the express condition that "[t]he *Republic of the Philippines* guarantee to decide about the seizure or restitution of the assets to the entitled parties, respectively, in judicial proceedings which satisfy [certain] procedural principles." *Fed. Office*, *supra*, at 10 (emphasis added). That determination "must be taken *in the Philippines* where the criminal actions were committed." *Republic of the Phil.*, *supra*, at 217 (emphasis added). In reaching this conclusion, the Swiss Federal Supreme Court specifically addressed the claims of the human rights plaintiffs in the *Hilao* litigation, finding that those plaintiffs were not entitled to attach assets held by Marcos in Switzerland. Instead, the Swiss court reasoned that "the victims of the Marcos regime as a matter of principle are obliged to either participate in the probate proceedings [in the Philippines] if they want to assert Ferdinand Marcos' personal responsibility for the human rights violations committed during his tenure, or they have to claim

[13] In fact, while the court of appeals erred by taking Philippine policy into account at all, the Ninth Circuit also was wrong in its view that the Philippine government has been indifferent to the suffering of persons injured by the Marcos administration. A bicameral committee of both Houses of the Philippine Congress recently approved a compromise bill to provide substantial compensation to human rights claimants, after similar bills passed both Houses. See Phil. Senate bill No. 1745; Phil. House bill No. 3315. That compromise bill is likely to be enacted into law shortly.

damages from the Philippine government for the wrongs committed by its organs." *Fed. Office*, *supra*, at 28. Were that not the case, the court concluded, "individual creditors [could] prevent mutual assistance measures of Switzerland by appealing to American courts." *Id.* at 33. Decisions like the one below, however, do precisely that, interfering with international processes for combating official corruption and discouraging foreign tribunals from assisting American courts in the repatriation of stolen assets.

Indeed, those same concerns prompted the United States to file a brief in the Ninth Circuit seeking reversal of an earlier decision issued by the same district judge who presided in this case, arising out of an earlier round of litigation regarding entitlement to assets stolen by Marcos. Br. for the United States as Amicus Curiae, *Hilao* v. *Marcos*, 103 F.3d 789 (9th Cir. 1996) (No. 95-16779), 1996 WL 3418836. The issues in that case were similar in substantial respects to those here. As in this case, where Judge Real directed Merrill Lynch to transfer the Arelma assets to Hawaii and commence an interpleader action there, in *Hilao* Judge Real directed two Swiss banks to transfer frozen Marcos-related assets to Hawaii so that he could conduct an interpleader action to determine whether those assets should be awarded to human rights plaintiffs. See *id.* at *3-*6. As here, the "basic issue in the case [was] whether assets of the Marcos Estate * * * should be distributed to the Philippine Government or to its citizens." *Id.* at *10.

Supporting the banks' appeal, the United States explained that the district court's attempt to interplead the assets "undermines important interests of Switzerland and the Philippines and threatens to discourage international cooperation in matters affecting criminal law enforcement." 1996 WL 3418836, at *2. Pointing to the freeze orders entered by Swiss authorities, the United States noted that, "[i]f our courts do not respect the valid orders entered by other nations, the courts in other countries cannot be expected to

honor orders entered in other countries for our benefit, or orders issued by the United States." *Id.* at *14. The United States also explained that the district court's approach "undermined significant interests" of the Philippines, "which has a strong interest in ensuring that its criminal laws are enforced, and that is particularly true with respect to the serious misappropriation and public corruption charges filed against the Marcoses." *Id.* at 15.[14] These same concerns have obvious currency in this case, where adjudication of entitlement to the Arelma assets by United States courts undermines application of Philippine anti-corruption law, interferes with the Republic's legitimate attempt to recover stolen assets, and is inconsistent with the Swiss Federal Supreme Court's transfer of the Arelma shares to the Philippines.

To the extent that there is doubt about this, it would be appropriate for the Court to invite the United States to submit its views on the question. See *Altmann*, 541 U.S. at 701-702 (State Department views "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy"); *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). We submit, however, that there should be no doubt about the proper outcome here. The legal and foreign policy implications of the holding below are profound. If the interests of a close ally of the United States are to be impaired – and the law as it relates both to sovereign immunity and to Rule 19(b) is to be modified – it should be this Court, rather than the Ninth Circuit, that says so.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[14] Responding to those concerns, the Ninth Circuit set aside the district court's order in that case. *Hilao* v. *Estate of Marcos*, 95 F.3d 848 (9th Cir. 1996).

Respectfully submitted.

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MARCH 2007

APPENDIX

APPENDIX A

United States Court of Appeals, Ninth Circuit.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED

v.

ENC CORPORATION

[remainder of caption omitted]

Nos. 04-16401, 04-16503, 04-16538.

Argued and Submitted March 14, 2005.

Filed Sept. 12, 2006.

Before JOHN T. NOONAN, SIDNEY R. THOMAS, Circuit Judges, and JAMES L. ROBART,* District Judge.

ORDER

NOONAN, Circuit Judge.

The opinion filed May 4, 2006, and amended May 9, 2006, is hereby WITHDRAWN. An amended opinion is filed concurrently with this order.

With the filing of the amended opinion, the panel has voted to deny the petition for rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judge Noonan and Judge Robart so recommend.

The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing is DENIED, and the petition for rehearing en banc is DENIED.

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

OPINION

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimentel (Pimentel). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Federal Rule of Civil Procedure 19(b). We affirm the judgment of the district court.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000, by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1972 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Phil.*, 309 F.3d 1143, 1149-52 (9th Cir.2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. *See* An Act Declaring Forfeiture in Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Rep. Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the action. *Republic of the*

Phil., 309 F.3d at 1153.

Pimentel is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir.1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to human rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas* v. *Marcos*, 89 Hawai'i 91, 969 P.2d 1209 (1998). The Hawai'i Supreme Court has allowed Roxas's judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

The case is governed by Federal Rule of Civil Procedure 19. The first section of the rule speaks of "persons needed for just adjudication." Fed. R. Civ. P. 19. The Republic falls within this section because, as the rule puts the matter, the Republic

> claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest.

Fed. R. Civ. P. 19(a)(2). Such a party should be joined to the action.

The rule goes on to prescribe what a court should do "whenever joinder is not feasible." Fed. R. Civ. P. 19. In such a case,

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). Indispensability "can only be determined in the context of particular litigation." *Provident*

Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102, 118, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself, viewed through the lens of "equity and good conscience." *Id.* at 109, 88 S.Ct. 733.

We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties. Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said:

> the district court ... held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion.

Merrill Lynch v. *Pimental*, [sic] Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb.20, 2004) (per curiam). Pimentel argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

Accordingly, we must apply the factors set forth in Rule 19(b), in "the context of [this] particular litigation." *Provident Bank*, 390 U.S. at 118, 88 S.Ct. 733. The phrase "equity and good conscience" in our judicial usage is coterminous with the early opinions of the United States Supreme Court.

See Elmendorf v. *Taylor*, 10 Wheat. 152, 23 U.S. 152, 181, 6 L.Ed. 289 (1825). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see Montana* v. *Crow Tribe of Indians*, 523 U.S. 696, 707, 118 S.Ct. 1650, 140 L.Ed.2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness in the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

Prejudice to the Republic

First, we must consider whether a judgment rendered in the absence of the Republic "might be prejudicial to [it] or to those already parties." Fed. R. Civ. P. 19(b). Following the example of the Supreme Court in conducting this analysis, *see Provident Bank* at 115-16, 88 S.Ct. 733, we consider the circumstances and practicalities of the Republic's claim.

The general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir.1990), we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond a three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want

of indispensable parties. Similarly, in *Manybeads* v. *United States*, 209 F.3d 1164 (9th Cir.2000), a difficult controversy had been settled by an Accommodation Agreement entered into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under Rule 19, it is not the sole consideration.

The Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir.1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account. *See Provident Bank*, 390 U.S. at 115, 88 S.Ct. 733.

To protect a party as indispensable, Rule 19 requires "an 'interest' that will be impaired by the litigation 'as a practical matter.'" *Am. Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1023 (9th Cir.2002). As a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets. The res is in the United States. It cannot be fi-

nally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving the assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 88 S.Ct. 733, 19 L.Ed.2d 936. We do so now.

Scenario one: We dismiss this action. Pimentel sues Merrill Lynch in New York for the assets. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. *See* N.Y. C.P.L.R. § 213. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986; the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Pimentel takes the assets to the extent of his judgment. Scenario two: The plaintiff is the Republic. The Republic is time-barred. Pimentel intervenes and obtains the assets.

The Republic insists that it could obtain a judgment regarding the ownership of these assets in the Philippines, where it is relieved of any statute of limitations. But a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States. If a Philippine court were to issue such a decree, a court of this country would not be bound to give it effect. *See Tchacosh Co.* v. *Rockwell Int'l Corp.*, 766 F.2d 1333, 1336 (9th Cir.1985); *see also* Restatement (Third) of the Foreign Relations Law of the U.S. § 482(2)(a) (1987).

Finally, we note that any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386, 100 S.Ct. 616, 62 L.Ed.2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed,

the Republic might seek the equivalent of the assets from their present holder, Merrill Lynch, in New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford* v. *Int'l Harvester Co.*, 668 F.2d 142, 147 (2d Cir.1981); N.Y. C.P.L.R. § 213 (misappropriation of public property). Tolling by Marcos's time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

The Possibility of Protective Provisions

Rule 19(b) requires us to assess the opportunity for the court to use "protective provisions in the judgment" by which "the prejudice" to the absent party "can be lessened or avoided." Fed. R. Civ. P. 19(b). Because the Republic has little practical likelihood of obtaining the Arelma asserts, there is no need to lessen prejudice to it.

Adequacy of Judgment and Availability of Alternative Forums

Under Rule 19(b), we are charged with determining whether "a judgment rendered in [the Republic's] absence will be adequate" and "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Fed. R. Civ. P. 19(b). We note the presence in this action of victims of the former president of the Republic. The class represented by Pimentel has secured a judgment against Marcos of almost $2 billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them.

The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic

has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. If we dismiss the action for nonjoinder of the Republic, they will have no forum within the Philippines open to their claims. They might sue again within the United States, perhaps in New York, yet such a suit would merely raise the same question of indispensability.

Balancing of the Factors

In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimentel and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

The Claims of Arelma and the Philippine National Bank

As the district court has determined, Arelma is a shell corporation, *Merrill Lynch* v. *Arelma, Inc.*, No. CV00-595-R, Slip Op. at 12 (D.Haw. Jul. 12, 2004), and the court may look through the corporate form to Marcos, the owner of its assets. *Chung* v. *Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721, 723 (1981). Accordingly, neither Arelma itself nor the Philippine National Bank as escrow holder now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

The Claims of Roxas and Golden Budha

Roxas was a victim, too. His injury was suffered before the date used to determine the Pimentel class. The district court, however, found that Roxas had not proven that the assets in the Arelma account derived from any treasure stolen from him. Roxas contends that the district court erred in excluding expert testimony regarding the source of the funds

and in excluding depositions of fact witnesses from his earlier action against Marcos. We do not believe that the district court abused its discretion in either ruling. The expert failed to produce the report required by Fed. R. Civ. P. 26(a)(2), and the district court acted within its discretion in excluding his testimony. *See Yeti by Molly, Ltd.* v. *Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-06 (9th Cir.2001). As for the depositions, they were excludable as hearsay because the cross examination in the prior proceeding was not undertaken by a party with a "similar motive to develop the testimony." Fed.R.Evid. 804(b)(1). We agree with the district court that the record does not support a finding that the Arelma assets were stolen from Roxas.

As the district court held, Roxas's tort judgment is against Imelda Marcos personally. It does not bind the Marcos estate. Roxas has no claim to be satisfied here.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

United States Court of Appeals, Ninth Circuit.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED

v.

ENC CORPORATION

[remainder of caption omitted]

Nos. 04-16401, 04-16503, 04-16538.

Argued and Submitted March 14, 2005.

Filed May 4, 2006.

Amended May 9, 2006.

Before JOHN T. NOONAN, SIDYNEY R. THOMAS, Circuit Judges, and JAMES L. ROBART,* District Judge.

ORDER AMENDING OPINION AND AMENDED OPINION

NOONAN, Circuit Judge.

ORDER

The opinion filed on May 4, 2006, is amended as follows: on slip opinion page 5038, lines 29-32, the following sentence is deleted: "The phrase 'equity and good conscience' in our judicial usage is coterminous with the first opinions of the United States Supreme Court. *See Hollingsworth* v. *Ogle*, 1 U.S. 257, 1 Dall. 257, 1 L.Ed. 126 (1788)."

On slip opinion page 5038, line 29, the following sentence is added: "The phrase 'equity and good conscience' in our judicial usage is coterminous with the early opinions of the United States Supreme Court. *See Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 181, 6 L.Ed. 289 (1825)."

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* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

OPINION

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimental (Pimental). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Fed. R. Civ. P. 19(b). We affirm the judgment of the district court as modified below.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000 by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1972 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

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tion. *Republic of the Philippines*, 309 F.3d at 1153.

Pimental is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *In re Estate of Ferdinand R. Marcos Human Rights Litigation*, 103 F.3d 762 (9th Cir.1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

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The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to human rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas* v. *Marcos*, 89 Hawai'i 91, 969 P.2d 1209 (1998). The Hawai'i Supreme Court has allowed Roxas' judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

The case is governed by Fed. R. Civ. P. 19. The first section of the rule speaks of "persons needed for just adjudication." The Republic falls within this section because, as the rule puts the matter, the Republic "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest." Such a party should be joined to the action. Rule 19(a). The rule goes on to prescribe what a court should do "whenever joinder is not feasible." In such a case, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Rule 19(b).

We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties. Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Indispensability "can only be determined in the context of particular litigation." *Provident Bank* v. *Patterson*, 390 U.S. 102, 118, 88 S.Ct. 733, 19 L.Ed.2d 936

(1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself: equity and good conscience. *Id.* at 109, 88 S.Ct. 733. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said: "the district court ... held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion." *Merrill Lynch* v. *Pimental*, Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb. 20, 2004) (per curiam). Pimental argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

The phrase "equity and good conscience" in our judicial usage is coterminous with the early opinions of the United States Supreme Court. *See Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 181, 6 L.Ed. 289 (1825). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see*, *Montana* v. *Crow Tribe of Indians*, 523 U.S. 696, 707, 118 S.Ct. 1650, 140 L.Ed.2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness and the moral weighing that should attend the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht* v. *Bowles*, 321 U.S. 321,

329, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

What do equity and good conscience now require here? First, the general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir.1990) we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond the three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want of indispensable parties. Similarly, in *Manybeads* v. *United States*, 209 F.3d 1164 (9th Cir.2000) a difficult controversy had been settled by an Accommodation Agreement entered into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under the guidance of equity and good conscience, it is not the sole consideration.

Second, the Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned

since *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir.1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account.

Any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386, 100 S.Ct. 616, 62 L.Ed.2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed, the Republic might seek the equivalent of the assets from their holder, Merrill Lynch, in New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford* v. *International Harvester Co.*, 668 F.2d 142, 147 (2d Cir.1981); NY CPLR § 213 (misappropriation of public property). Tolling by Marcos' time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

Third, we note the presence in this action of victims of the former president of the Republic. The class represented by Pimental has secured a judgment against Marcos of almost $2 billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary

meaning for the poor among them. The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?

Roxas was a victim, too. His injury was suffered before the date used to determine the class. He, too, has a judgment against Marcos, which resulted in an award of damages that has been affirmed on appeal. *Roxas* v. *Marcos*, 109 Hawai'i 83, 123 P.3d 208 (2005) (unpublished). Should he, an early victim of Marcos, recover more in this action than the victims comprising the class? Roxas's claim that the assets could be traced to the Merrill Lynch account was not accepted by the district court. But if it were accepted, we believe that equity could assign him no more than the pro rata share due any class member; it is fair to treat him as entitled to this much and no more.

A final consideration: the res is in the United States. It cannot be finally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 88 S.Ct. 733, 19 L.Ed.2d 936. We do so now:

Scenario one: We dismiss this action. Roxas sues Merrill Lynch in New York for the assets asserting conversion. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986;

the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Roxas takes the assets to the extent of his judgment. Scenario two: The same, except the successful plaintiff in New York is Pimental. Scenario three: The plaintiff is the Republic. The Republic is time-barred. Pimental and Roxas intervene and obtain their proportionate share of the assets. Realistically, we cannot envisage a lawsuit in which the Republic will prevail.

In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimental and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

As the district court has determined, Arelma is a shell corporation, and the court may look through the corporate form to Marcos, the owner of its assets. *Chung* v. *Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721, 723 (1981). Accordingly, neither Arelma itself nor the Philippine National Bank now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

Accordingly, we AFFIRM the judgment of the district court, modified to allot to Roxas a share of the assets no greater than that of any class member.

APPENDIX C

United States Court of Appeals, Ninth Circuit.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED

v.

ENC CORPORATION

[remainder of caption omitted]

Nos. 04-16401, 04-16503, 04-16538.

Argued and Submitted March 14, 2005.

Filed May 4, 2006.

Before NOONAN, THOMAS, Circuit Judges, and JAMES L. ROBART,[1] District Judge.

NOONAN, Circuit Judge.

In this interpleader action, appeal is made by the several parties dissatisfied with the decision of the district court awarding the funds in dispute to the Class of Human Rights Victims represented by Mariano Pimental (Pimental). We hold that the Republic of the Philippines and the Presidential Commission on Good Government (the PCGG) (collectively, the Republic) are not indispensable parties under Fed. R. Civ. P. 19(b). We affirm the judgment of the district court as modified below.

PARTIES AND PROCEEDINGS

Interpleader was begun on September 21, 2000 by Merrill, Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch), the custodian of the assets of Arelma, S.A. (Arelma), now amounting to approximately $35 million. The Merrill Lynch account was found by the district court to have been established in 1992 by a deposit of $2 million by Ferdinand E. Marcos, then the president of the Republic. The shares of

[1] The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

Arelma, a Panamanian corporation, are now held in escrow by the Philippine National Bank, pending an ownership determination by the Philippine courts.

The Republic was made a defendant in the interpleader and successfully asserted its sovereign immunity. *In re Republic of the Philippines*, 309 F.3d 1143, 1149-52 (9th Cir.2002). The Republic now maintains that it is an indispensable party inasmuch as the Republic asserts that the Arelma assets were acquired by Marcos illegally and never lawfully belonged to him but from the beginning of his acquisition belonged to the Republic. See An Act Declaring Forfeiture in Favor of the State of Any Property Found to Have Been Unlawfully Acquired by Any Public Officer or Employee and Providing for the Proceeding Therefor, Republic Act No. 1379 (1955) (Forfeiture Act). In the 2002 appeal here, we ruled that the Republic was a necessary party but declined to rule that the Republic was indispensable. We stayed the action. *Republic of the Philippines*, 309 F.3d at 1153.

Pimental is the representative of 9,539 persons who brought suit against Marcos after his fall from power and in 1996 won a judgment against his estate of nearly $2 billion. *Hilao* v. *Estate of Ferdinand Marcos*, 103 F.3d 767 (9th Cir.1996). This class, composed of victims of a rough and rapacious ruler, who often exercised arbitrary power, is a group whose sufferings naturally evoke sympathy. The district court dissolved the stay and awarded all the Arelma assets to them.

Arelma, that is the corporation itself, and the Philippine National Bank, the escrow holder of its stock, have filed a single brief contending that Arelma is an indispensable party and that the district court lacked jurisdiction over Arelma.

The Estate of Roger Roxas and the Golden Budha (sic) Corporation have similar interests. The Yamashita Treasure was discovered by Roxas and stolen from Roxas by Marcos's men. Roxas was tortured and imprisoned, giving rise to hu-

man rights claims valued at $6 million. Roxas formed a corporation to which he assigned his rights in the treasure; the corporation, for reasons connected with the warrants issued to Roxas, carries a misspelled name. The Estate of Roger Roxas and the corporation (collectively Roxas) won an initial judgment against Imelda Marcos and the Estate of Ferdinand Marcos. *Roxas* v. *Marcos*, 89 Hawai'i 91, 969 P.2d 1209 (1998). The Hawai'i Supreme Court has allowed Roxas' judgment against Imelda Marcos to stand, while holding that the Estate of Ferdinand Marcos could not be bound by that judgment. *Id.* at 1244. Roxas claims the Arelma assets both as a creditor of Marcos and on the basis that the $2 million used by Marcos to set up the Merrill Lynch account were most probably derived from the Yamashita Treasure and can be traced to the property stolen from Roxas.

Other parties named in the caption of the case have not pursued the appeal.

ANALYSIS

The case is governed by Fed. R. Civ. P. 19. The first section of the rule speaks of "persons needed for just adjudication." The Republic falls within this section because, as the rule puts the matter, the Republic "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [its] absence may (i) as a practical matter impair or impede [its] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [its] claimed interest." Such a party should be joined to the action. Rule 19(a). The rule goes on to prescribe what a court should do "whenever joinder is not feasible." In such a case, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be

prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Rule 19(b).

We have determined that the Republic is a necessary party in this proceeding. That determination appears to mean that for a just disposition of the assets it is necessary that the Republic participate. In ordinary speech, a necessary party would be an indispensable party. Rule 19(b), however, distinguishes between necessary and indispensable parties. Rule 19(b) indicates that indispensability must meet a higher standard than necessity. Indispensability "can only be determined in the context of particular litigation." *Provident Bank* v. *Patterson*, 390 U.S. 102, 118, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968). In determining indispensability, we apply the criteria supplied by Rule 19(b) itself: equity and good conscience. *Id.* at 109, 88 S.Ct. 733. Only if equity and good conscience require it is a necessary party also indispensable.

In an appeal from the district court's dissolution of the stay, we came close to saying that the Republic was not indispensable. We said: "the district court ... held a hearing and entered findings of fact regarding the impact of the Philippine litigation and the propriety of going forward in the absence of necessary parties, *i.e.*, the Republic and PCGG. We conclude that [the] district court ultimately acted within the spirit of this court's mandate and properly exercised its discretion." *Merrill Lynch* v. *Pimental*, Nos. 03-16742, 03-16743, at 3-4 (9th Cir. Feb. 20, 2004) (per curiam). Pimental argues that implicitly our decision found no parties to be absent but indispensable. We, however, were addressing only the decision to lift the stay. Our decision does not have res judicata effect on the question of indispensability here presented.

The phrase "equity and good conscience" in our judicial usage is coterminous with the early opinions of the United States Supreme Court. *See Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 181 (1825). Undoubtedly in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and "good conscience" referred to an interior moral arbiter regarded as the voice of God. As the phrase has become domesticated and invoked in modern times, *see*, *Montana* v. *Crow Tribe of Indians*, 523 U.S. 696, 707, 118 S.Ct. 1650, 140 L.Ed.2d 898 (1998), the distinction of its two elements has blurred, and it has a secular rather than religious cast. Still, its unique appearance in Rule 19 of the Federal Rules of Civil Procedure emphasizes the flexibility that a judge may find necessary in order to achieve fairness and the moral weighing that should attend the judge's choice of solutions, a choice to be marked by "mercy and practicality." *Hecht* v. *Bowles*, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

What do equity and good conscience now require here? First, the general rule is that a sovereign need not forfeit its immunity to protect its assertion of indispensability. In the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action. This general rule has been developed in cases involving Indian tribes. For example in, *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir.1990) we held that where the Makah Indian Tribe sought a reallocation of fishing rights beyond the three-mile limit, any reallocation would affect the rights of 23 other Indian tribes whose sovereign immunity prevented them being made parties. Prejudice to these tribes was inevitable; no relief could be shaped and no adequate remedy could be given that would remove the prejudice. In equity and good conscience, the case had to be dismissed for want of indispensable parties. Similarly, in *Manybeads* v. *United States*, 209 F.3d 1164 (9th Cir.2000) a difficult controversy had been settled by an Accommodation Agreement entered

into by the Hopi Tribe, the Navajo Nation and representatives of individual Navajos and by a Settlement Agreement reached between the Hopi Tribe and the United States. A few Navajos who were dissatisfied challenged the agreements in a suit directed against the United States. We ended the litigation by holding that the Hopi Tribe was an indispensable party because upsetting the agreement would inflict substantial monetary loss on the Hopi Tribe and affect its peaceful relations with the Navajo Nation. As a sovereign, the Hopi Tribe could not be subjected to the suit. Indispensable, it was absent and so put an end, in equity and good conscience, to the underlying litigation. A fortiori, when the sovereign is a foreign state, prejudice to it is a powerful consideration. However, under the guidance of equity and good conscience, it is not the sole consideration.

Second, the Republic's right in the United States to reclaim the spoils of office from Marcos has been unquestioned since *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir.1988) (en banc). The Republic has set up the PCGG to effect this end. It is now eighteen years since the 1988 decision and four years since we stayed this action. The shares of Arelma have been since 1995 in escrow at the Philippine National Bank. In all this time, the Republic has not obtained a judgment that the assets in dispute belong to it. We do not hold the Republic guilty of laches, but we do note as an equitable consideration that its failure to secure a judgment affecting these assets is a factor to be taken into account.

Any judgment entered in this action cannot bind the Republic because it is not a party to the action. *See Idaho ex rel. Evans* v. *Oregon*, 444 U.S. 380, 386, 100 S.Ct. 616, 62 L.Ed.2d 564 (1980). Consequently, if we act here, the Republic would remain free to sue for the Arelma assets in a forum of its choice. True, unless it acts with alacrity, the assets may be distributed after judgment here and be beyond recapture. After the assets are distributed, the Republic might seek the equivalent of the assets from their holder, Merrill Lynch, in

New York where they were invested. But it would be confronted with the New York statute of limitations of six years for its underlying claim. *See Stafford* v. *International Harvester Co.*, 668 F.2d 142, 147(2d Cir.1981); NY CPLR § 213 (misappropriation of public property). Tolling by Marcos' time in office would not help it. The generous provision for recapture of the assets provided by the new constitution of the Philippines would not trump New York law. In practical effect, a judgment in this action will deprive the Republic of the Arelma assets.

Third, we note the presence in this action of victims of the former president of the Republic. The class represented by Pimental has secured a judgment against Marcos of almost $2 billion, which the assets in dispute will scarcely satisfy. Nonetheless, the symbolic significance of some tangible recovery is not to be disregarded, and if the recovery is distributed pro rata among the individuals, it will have monetary meaning for the poor among them. The counter consideration, that most of the victims are citizens of the Philippines and should find redress from their own government, is outweighed by the fact that the Republic has not taken steps to compensate these persons who suffered outrage from the extra-legal acts of a man who was the president of the Republic. In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?

Roxas was a victim, too. His injury was suffered before the date used to determine the class. He, too, has a judgment against Marcos, which resulted in an award of damages that has been affirmed on appeal. *Roxas* v. *Marcos*, 109 Hawai'i 83 (2005) (unpublished). Should he, an early victim of Marcos, recover more in this action than the victims comprising the class? Roxas's claim that the assets could be traced to the Merrill Lynch account was not accepted by the district court. But if it were accepted, we believe that equity could assign

him no more than the pro rata share due any class member; it is fair to treat him as entitled to this much and no more.

A final consideration: the res is in the United States. It cannot be finally disposed of except by the judgment of a court in the United States. We have been instructed by the example of the Supreme Court to envisage how a lawsuit involving assets in dispute would play out in the light of the decision made on interpleader. *See Provident Bank*, 390 U.S. 102 at 112-117, 88 S.Ct. 733, 19 L.Ed.2d 936. We do so now:

Scenario one: We dismiss this action. Roxas sues Merrill Lynch in New York for the assets asserting conversion. The Republic intervenes, asserting its claim. The New York court holds the Republic barred by the six year statute of limitations. The court rejects the Republic's appeal to toll the statute when Marcos was in office, because Marcos left in 1986; the court also finds that the post-Marcos constitution of the Republic does not affect the New York limitation on actions. Roxas takes the assets to the extent of his judgment. Scenario two: The same, except the successful plaintiff in New York is Pimental. Scenario three: The plaintiff is the Republic. The Republic is time-barred. Pimental and Roxas intervene and obtain their proportionate share of the assets. Realistically, we cannot envisage a lawsuit in which the Republic will prevail.

In terms of the four factors set out by Rule 19(b) as included among those "to be considered," the Republic will not be prejudiced because it has no practical likelihood of obtaining the Arelma assets and so there is no need of lessening prejudice to it; judgment rendered in its absence will be adequate; if we dismiss the action for nonjoinder of the Republic, Pimental and Roxas will be required to sue again in New York, a needless repetition that will not benefit the Republic. No injustice is done it if it now loses what it can never effectually possess.

As the district court has determined, Arelma is a shell corporation, and the court may look through the corporate form to Marcos, the owner of its assets. *Chung* v. *Animal Clinic, Inc.*, 63 Haw. 642, 636 P.2d 721, 723 (1981). Accordingly, neither Arelma itself nor the Philippine National Bank now have an interest to be protected. Merrill Lynch risks being sued again, but it has indicated no dissatisfaction with the judgment.

Accordingly, we AFFIRM the judgment of the district court, modified to allot to Roxas a share of the assets no greater than that of any class member.

APPENDIX D

United States Court of Appeals, Ninth Circuit.

In re REPUBLIC OF THE PHILIPPINES;

[remainder of caption omitted]

Nos. 01-71841, 02-15340.

Argued and Submitted June 14, 2002.

Filed Oct. 31, 2002.

Before: SCHROEDER, Chief Judge, HARLINGTON WOOD, JR.,[1] and D.W. NELSON, Circuit Judges.

SCHROEDER, Chief Judge.

This interpleader litigation is part of an on-going dispute between the Philippine government and creditors of the Estate of Ferdinand E. Marcos over assets Marcos allegedly secreted from the government while he was President of the Philippines. This litigation concerns the assets of Arelma Incorporated, a Panamanian company Marcos created. The assets were held in an account in New York by Merrill Lynch, the plaintiff in this action, until the assets were turned over to the district court in September 2000.

The defendant creditors include human rights victims whose claims we upheld in *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir.1996). The Republic of the Philippines ("Republic") is also a defendant in this action as is the Presidential Commission on Good Government ("PCGG"), an agent or instrumentality of the Republic.

This is an appeal by the Republic and the PCGG from the district court's ruling on two motions to dismiss them as parties to the suit: the Republic and the PCGG's own motion to dismiss on sovereign immunity grounds and the creditors' motion to dismiss the Republic and the PCGG on the basis

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[1] The Honorable Harlington Wood, Jr., Senior Circuit Judge of the Seventh Circuit, sitting by designation.

that they are not real parties in interest. The district court granted the creditors' motion to dismiss and the Republic and the PCGG appeal. We reverse because we hold that the district court should have dealt with immunity first and that the Republic and the PCGG are immune from suit.

PROCEDURAL BACKGROUND

In 1972, Marcos transferred approximately $2 million to Arelma, placing the money in an account with Merrill Lynch in New York. After Marcos was deposed in 1986, President Corazon Aquino created the PCGG, an agency charged with recovering assets of the Republic that were wrongfully acquired by Marcos while he was in office. In July 2000, the PCGG asked Merrill Lynch to turn over the Arelma assets to the Philippine National Bank ("PNB"). The PCGG proposed that the PNB act as an escrow agent and hold the assets pending a ruling in the Sandiganbayan, a Philippine anti-corruption court, on whether the assets belonged to the Republic or the Marcos Estate.

Merrill Lynch denied the request, apparently because of the existence of other claimants, and instead filed this interpleader action in the U.S. District Court for the District of Hawaii on September 14, 2000, seeking to resolve conflicting claims to the Arelma assets. The complaint named as defendants several possible claimants. They included the Republic, the PCGG, Arelma, the Estate of Roger Roxas, the Golden Budha Corporation, and Mariano J. Pimentel. The Roxas Estate and Golden Budha assert claims as judgment creditors of the Marcos Estate on the basis of judgments obtained in state court. Pimentel is a member of the plaintiff class of human rights claims that obtained a judgment against the Estate on February 3, 1995. *See Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir.1996). The district court granted Pimentel's motion to join the PNB in May 2001.

The Republic and the PCGG moved to dismiss the interpleader arguing, *inter alia*, that they were entitled to sover-

eign immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604. Pimentel also moved to dismiss the Republic and the PCGG claiming that they were not real parties in interest. The Republic and the PCGG then asked the court to determine their immunity and dismiss the action because they claimed they were indispensable parties. Fed. R. Civ. P. 19(b). The district court held a telephonic hearing on September 24, 2001.

At that hearing, the district court said that it was granting Pimentel's motion to dismiss the Republic and the PCGG because the court found they were not real parties in interest. The court declined to decide any issue of sovereign immunity. The district court then entered a written order on December 20, 2001, that stated:

> Defendants PNB, with offices in Honolulu, and Arelma are the real parties in interest as to claims that may be proffered by the Republic and PCGG, and the former are capable of asserting claims to the assets that had been held by Merrill Lynch in account No. 165-07312 in the name of Arelma (the "Assets") and were deposited by Merrill Lynch with the Court, including the claim that the source of the Assets was stolen. The Republic and PCGG have both sought to be dismissed from the lawsuit on various grounds and have averred under oath that PNB has exclusive authority to control the assets at issue. Therefore, defendants PNB and Arelma are the real parties in interest as to claims that the Republic and PCGG may make in this interpleader proceeding.

The court denied as moot the Republic and the PCGG's motion to dismiss on sovereign immunity and ruled that "neither the Republic nor PCGG are necessary or indispensable parties in this litigation." The district court also continued its prior injunction that enjoined defendants named in the interpleader from bringing any further actions in the United States

to pursue the Arelma assets. The Republic and PCGG appeal their dismissal on the merits and the denial of their motion for dismissal based on sovereign immunity.

Because denial of a motion to dismiss on grounds of foreign sovereign immunity may result in the parties having to litigate claims over which the court lacks jurisdiction, we permit an interlocutory appeal from the denial of a motion to dismiss on sovereign immunity grounds. *See Schoenberg* v. *Exportadora de Sal, S.A.*, 930 F.2d 777, 779 (9th Cir.1991) (denial of motion to dismiss on grounds of foreign sovereign immunity is an appealable interlocutory order under collateral order doctrine). It is on that basis that we exercise jurisdiction over this appeal. We deny as moot appellants' mandamus petition filed as an alternative route to jurisdiction.

IMMUNITY UNDER THE FSIA

The effect of the district court's ruling was to adjudicate the merits of the Republic's claim to the assets and thus effectively deny its claim to sovereign immunity. The district court determined that the Republic and the PCGG had no claim to the Arelma assets, thus proceeding to the heart of the dispute, without first determining whether the Republic and the PCGG had sovereign immunity. We agree with the Republic that the district court should have addressed the merits of the immunity question first in order to preserve the immunity that may be determined to exist. *See Phaneuf* v. *Republic of Indonesia*, 106 F.3d 302, 305 (9th Cir.1997) (noting that "[i]mmunity under the FSIA is not only immunity from liability, but immunity from suit"); *Siderman de Blake* v. *Republic of Argentina*, 965 F.2d 699, 706 (9th Cir.1992) (stating that before reaching the merits of a claim against a foreign state, court should determine whether it has jurisdiction under the FSIA).

The FSIA provides the sole basis for subject matter jurisdiction over foreign states and their agents or instrumentalities. *See* 28 U.S.C. § 1604. The FSIA provides that a for-

eign state is immune from the jurisdiction of U.S. courts unless one of the statutory exceptions applies. 28 U.S.C. §§ 1604, 1605. The creditors do not dispute that the Republic and the PCGG are, respectively, a foreign state and its instrumentality within the meaning of the FSIA. 28 U.S.C. § 1603. The creditors, however, have the burden of establishing that one of the statutory exceptions applies. *See Siderman*, 965 F.2d at 707. The only two exceptions claimed to be applicable here are the "successor" exception, 28 U.S.C. § 1605(a)(4), and the "implied waiver" exception, 28 U.S.C. § 1605(a)(1).[2]

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[2] 28 U.S.C. § 1605 provides:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to-

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable; or

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of

The "successor" exception provides that a foreign state is not immune if "rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). The creditors argue that because some of them are judgment creditors of Marcos' family members that inherited the Marcos Estate, succession rights are "in issue" in the interpleader action within the meaning of the statute. The creditors do not contend that the Republic has acquired any

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title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph-

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C.App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS) in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if-

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state ...

right by succession. They argue that the statute requires only that some rights acquired by succession be "in issue" in the case, not necessarily the rights of the foreign sovereign. The creditors' interpretation of the statute is not supported by the statute, the legislative history, or principles of international law. For the reasons we now explain, we conclude the exception applies only when the sovereign's claim is as a successor to a private party.

The FSIA's exceptions focus on actions taken by or against a foreign sovereign. For example, § 1605(a)(1) provides that a foreign state is not entitled to immunity if the state either explicitly or implicitly waives immunity. Another exception provides that a foreign state does not have immunity when it carries out commercial activity in the United States. 28 U.S.C. § 1605(a)(2). Yet another exception applies when a party asserts a claim for money damages "against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States." 28 U.S.C. § 1605(a)(5).

The legislative history to the FSIA also indicates that the "successor" exception is concerned with rights acquired by a foreign sovereign. The House Report stated:

> There is general agreement that a foreign state may not claim immunity when the suit against it relates to rights in property, real or personal, obtained by gift or inherited by the foreign state and situated or administered in the country where the suit is brought ... The reason is that, in claiming rights in a decedent's estate or obtained by gift, the foreign state claims the same right which is enjoyed by private persons.

H. Rep. No. 94-1487, 94th Cong.2d sess. 6619. Thus, because the Republic is not a party by virtue of its succession to a private party's claim or putative liability, the exception does not apply in this case.

Any remaining doubt is resolved by looking to broader statements of international law. The Restatement (Third) of Foreign Relations Law states that under international law, "a state is not immune from the jurisdiction of the courts of another state with respect to claims ... to property, whether tangible or intangible, acquired by the state through succession or gift." *Restatement (Third) of Foreign Relations Law* § 455(1)(b) (1987). The Restatement also states that "[c]ourts in the United States may exercise jurisdiction over claims against a foreign state relating to property ... [acquired by the state through succession or gift] ... when the property is in the United States." *Id.* § 455(2). The focus is thus on whether the foreign state has acquired by succession, not whether any party to the action has acquired a right by succession.

The creditors also claim that the FSIA's "implied waiver" exception applies. 28 U.S.C. § 1605(a)(1). The "implied waiver" exception is construed narrowly. However, we generally find an implied waiver in only three circumstances:

> (1) a foreign state has agreed to arbitration in another country; (2) a foreign state has agreed that a contract is governed by the law of a particular country; and (3) a foreign state has filed a responsive pleading in a case without raising the defense of sovereign immunity.

Joseph v. *Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir.1987). None of these circumstances exist. There has been no consent to arbitration in this country; there is no contractual foreign law provision; and the Republic has consistently maintained its defense of immunity in this action. A motion to dismiss, which the Republic has filed, is not a responsive pleading. Fed. R. Civ. P. 12(b). The Republic and the PCGG in asserting their immunity on appeal state that they do not object to a stay of the interpleader action if we do not order the case dismissed entirely, but this procedural concession to protect their immunity is not a waiver of immunity as the creditors try to suggest.

The creditors point to a Philippine Executive Order as proof that the Republic intended to waive its sovereign immunity. Executive Order No. 2 authorizes the PCGG "to request and appeal to foreign governments wherein any such assets or properties may be found to freeze them and otherwise prevent their transfer, conveyance, encumbrance, concealment or liquidation by former President Ferdinand E. Marcos ... pending the outcome of appropriate proceedings in the Philippines." The order does not refer to instituting court proceedings outside the Philippines and on its face contemplates executive action by foreign governments.

The creditors finally argue that we should nevertheless remand the case to the district court for discovery on the sovereign immunity issue. They have not, however, pointed to any discovery that would help support their claim that the exceptions they assert apply in this case. We conclude that the Republic and the PCGG are immune from suit under the FSIA and the district court should have granted their motion to dismiss them as parties on that ground.

DISMISSAL OF INTERPLEADER ACTION UNDER RULE 19

The Republic and the PCGG go on to contend that not only must they be dismissed as parties, but that the entire interpleader action must be dismissed because they are necessary and indispensable parties. Fed. R. Civ. P. 19. The PNB and Arelma join in this argument. We first determine whether an absent party is "necessary" to the action in order to protect its own interests, and if so, we then determine whether the suit should not proceed in that party's absence because it is "indispensable." *Shermoen* v. *United States*, 982 F.2d 1312, 1317 (9th Cir.1992).

Rule 19(a) provides that a party is necessary and "shall be joined if feasible" in the following situations:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the

> person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. P. 19(a). Rule 19(a) is intended "to protect a party's right to be heard and to participate in adjudication of a claimed interest." *Shermoen*, 982 F.2d at 1317. Thus, if the Republic's claim to the Arelma assets was represented by one of the other claimants, then the Republic is not a necessary party.

The creditors contend that other claimants, Arelma and the PNB, can adequately represent the interests of the Republic and the PCGG. The Republic and PCGG maintain they are necessary parties because their claim, that the Arelma assets were misappropriated and have always belonged to the Republic, is one made by no other party. Arelma and the PNB agree.

The Republic and the PCGG are correct that they assert a claim distinct from those asserted by Arelma and the PNB. Without the Republic and the PCGG as parties in this interpleader action, their interests in the subject matter are not protected. The Republic and the PCGG are therefore necessary parties. We turn to whether they are indispensable.

A party is indispensable under Rule 19(b) if in "equity and good conscience," the court should not allow the action to proceed in its absence. Fed. R. Civ. P. 19(b). *See also Dawavendewa* v. *Salt River Project Agric. Improvement and Power Dist.*, 276 F.3d 1150, 1161 (9th Cir.2002). The Rule sets forth four factors:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person

> or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

This is an interpleader action. The purpose of such an action is to resolve in one proceeding all claims to a res. *See Commercial Union Ins. Co.* v. *United States*, 999 F.2d 581, 583 (D.C.Cir.1993). Without all significant claimants in an interpleader action, its purpose is materially frustrated. *Id.* Given the inability of the court to resolve the claims of the Republic and the PCGG, it is difficult to see how this interpleader action can proceed in their absence. Although this strongly suggests they are indispensable, under Rule 19 the court is permitted to take into account the equitable circumstances of the other parties in considering whether a case may go forward even in the absence of a necessary party.

The creditors contend the action should go forward because they lack an alternative forum for the resolution of their claims, because the Philippine court, the Sandiganbayan, will apparently decide only disputes between the Republic and the Marcos Estate. This lack of an alternative forum normally weighs heavily against dismissal of the action. *See Dawavendewa*, 276 F.3d at 1161-62. This, however, is an interpleader action that has as its core purpose the resolution of all competing claims. In the absence of parties with substantial claims like those of the Republic and the PCGG, this interpleader action cannot presently proceed.

Merrill Lynch also opposes dismissal contending that its interest will be severely prejudiced if the case is dismissed entirely, because it would be subject to competing claims that

would be filed in different jurisdictions and result in potentially conflicting judgments. Merrill Lynch therefore asks that in the event we conclude that the Republic and PCGG are necessary parties, as we have, we enter a stay of the litigation pending resolution of claims in the Philippines.

The Republic and the PCGG agree to such a stay as an alternative to their preferred remedy of dismissal of the entire interpleader action. We believe in light of concerns expressed by the creditors about the adequacy of the Republic's forum, a stay may further the creditors' interests as well as Merrill Lynch's, in the event that later developments may render it more equitably feasible for proceedings to go forward in this case. Such developments might include resolution of the litigation in the Philippines or a change in the immunity status of the Republic and PCGG.

Accordingly, the district court's order dismissing the Republic and the PCGG on the merits is vacated. The matter is remanded for entry of an order granting the Republic and the PCGG's motion to dismiss on the grounds of sovereign immunity and entry of a stay of further proceedings.

REVERSED AND REMANDED.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERRILL LYNCH, PIERCE, FENNER
& SMITH INCORPORATED,
Plaintiff,
vs.
ARELMA, INC., et al.,
Defendants.
CASE NO. CV00-595-R

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before this Court, sitting without a jury, February 23, 2004, and the Court, having heard and considered the evidence, both oral and documentary, any stipulations of the parties, and the argument of counsel, finds the facts and states the conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure as follows:

FINDINGS OF FACT

1. Plaintiff Merrill Lynch, Pierce, Fenner & Smith Incorporated (Merrill Lynch) is a corporation organized under the laws of the State of Delaware with its principal place of business in New York, New York.

2. Claimant Arelma S.A., named herein as Arelma, Inc. (Arelma) is a corporation organized under the laws of Panama in 1972 by Ferdinand E. Marcos, and at all times has been and is now a corporation in good standing under Panamanian law. No stock was issued in Arelma S.A. upon its formation. Ferdinand E. Marcos was the sole owner of Arelma S.A.

3. Claimant Philippine National Bank (PNB) is a commercial banking corporation organized under the laws of

the Republic of the Philippines with its principal place of business in Metro Manila, Philippines and with a Hawaii-licensed foreign bank agency maintaining an office in Honolulu, Hawaii.

4. Claimant Mariano J. Pimentel (Pimentel) is a citizen of the Republic of the Philippines, residing in Honolulu, Hawaii, and is a member of the plaintiff' class that obtained a judgment in the total sum of nearly two billion dollars on February 3, 1995 against the Estate of Ferdinand E. Marcos (Marcos Estate) in the legal action entitled "In Re Estate of Ferdinand E. Marcos, Human Rights Litigation," MDL No. 840 (the Human Rights Victims' Judgment). On May 26, 1995 in the same legal action a contempt order was entered against Imelda R. Marcos and Ferdinand R. Marcos, Jr., which included a fine in the amount of $100,000 per day.

5. Defendant Estate of Roger Roxas (Roxas), whose personal representative is Felix Dacanay, a resident of Florida, and defendant Golden Budha Corporation (Golden Budha), a corporation organized under the laws of the State of Georgia, (collectively Roxas/Golden Budha) obtained a judgment, entered nunc pro tunc as of October 21, 1996, against Imelda Marcos, in her personal capacity to the extent of her interest in the Marcos Estate, in the sum of $19,275,848.37, plus taxable costs of $61,074.54 (the Roxas/Golden Budha Judgment).

6. All other named claimants have defaulted, have disclaimed any interest in the subject matter of this interpleader or have been dismissed by the Court, other than defendants ENC Corporation, John K. Burns and Frontier Risk Capital Management, LLC, each of whom filed Answers to the Complaint on file herein, but did not appear at trial. There is no evidence in support of any claim of those three defendants to the interpleaded assets.

7. Ferdinand E. Marcos served as president of the Philippines from 1965 until February 1986. (Jt. Pretrial Stip.) He

was the de jure government of the Republic of the Philippines during his term in office.

8. Ferdinand E. Marcos departed the Philippines in February 1986 and died in Hawaii on September 29, 1989. (Jt. Pretrial Stip.)

9. In 1972 Jean Louis Sunier, a Swiss banker, recommended to Ferdinand E. Marcos, through Marcos' friend Jose Campos, that Marcos set up a securities trading account in the United States. (Ex. 2)

10. The creation of Arelma in September 1972 coincided with Ferdinand E. Marcos' declaration of martial law in the Philippines. (Ex. 40)

11. During martial law, Marcos increased his individual power so that he could personally govern and direct the operation of the entire government. (Ex. 33 and 40) By his Order, tens of thousands of persons were arrested and detained without charges and without the right of habeas corpus. (Ex. 34 and 40) Thousands were subjected to hideous tortures. Thousands more were summarily executed and others simply "disappeared." (Ex. 35 and 40)

12. The Swiss banker recommended that the account be in the name of a Panamanian corporation called Arelma, Inc. which he caused to be formed in Panama in September 1972. (Ex. 2)

13. A securities account No. 165-07312, was established at Merrill Lynch in New York by Arelma in 1972. (Jt. Pretrial Stip.) On the account opening form Merrill Lynch listed the Arelma entity as a "holding company." (Ex. 6)

14. The account of Merrill Lynch was funded by Arelma with a deposit of $2,000,000 in 1972. (Jt. Pretrial Stip.; Ex. 8 and 9; Sunier Dep. 60) The source of those funds was Ferdinand E. Marcos.

15. The property which is the subject of this interpleader, is the assets which were held in a securities account No. 165-07312 at Merrill Lynch in the name of Arelma. (Jt.

Pretrial Stip.)

16. Merrill Lynch deposited the entire assets in account No. 165-07312, approximately $35 million, with the Clerk of the Court in Federal Court in Hawaii after Merrill Lynch filed this action in interpleader. (Jt. Pretrial Stip.; Ex. 32) Merrill Lynch makes no claim to ownership of Arelma assets.

17. The only share certificates in Arelma were issued in 1981 (9 years after its formation) when two bearer share certificates for 50 shares each were issued "in blank," meaning no name was inserted on the share certificates. Jean Louis Sunier, an officer of Swiss Bank corporation until 1983 and an officer and director of Suntrust Investment Co. thereafter, maintained possession and custody of the share certificates in trust for Ferdinand E. Marcos from 1981 until he surrendered them to the Swiss government as directed by that government in 2000. (Jt. Pretrial Stip.; Sunier Dep. 67) No Swiss court determined the ownership of the share certificates.

18. Arelma had the same officers, Messrs Sunier and Barbey who were Swiss Bank Corporation employees, until 1981 when the Bank required its employees to resign as officers of corporations whose financial affairs it managed. In 1983 Mr. Sunier arranged for three of his personal lawyers to be elected the new officers in a meeting held in his office at the Bank. Until 2000 these officers never changed and the officers never took any actions on behalf of Arelma. (Sunier Dep. 69; Ex. 19 and 29)

19. In early communications to the owner, Sunier used the euphemism of "friend" or "friends" when referring to Marcos. (Ex. 2, 13 and 14) In a letter dated May 19, 1983, to the account holder addressed "Dear Excellency" and containing the code word "Sapphire", Mr. Sunier gave the current account balance. (Sunier Dep. 86) Sunier also explained his change of Arelma officers but assured the account holder that "I keep on controlling all operations for the companies." The

reference to "Excellency" is to Fedinand E. Marcos. (Ex. 19)

20. From its inception, Arelma had articles of incorporation (or corporate constitution) but no corporate by-laws. The articles of incorporation required the shareholders to hold an annual meeting and to elect directors annually. (Ex. 46)

21. Arelma never held an annual shareholder meeting; and only held director meetings on two occasions over 28 years to change officers and directors and to issue the two stock certificates. (Sunier Dep. 87 and 89; Ex. 29)

22. Other than the two meetings of board members, Arelma has no minutes of director meetings prior to 2000. (Sunier Dep. 89)

23. Arelma never had any employees. (Sunier Dep. 90)

24. Arelma never had an accountant and never paid any income or corporate taxes. (Sunier Dep. 90)

25. Arelma never had standard financial statements, such as a balance sheet or profit and loss statement. (Sunier Dep. 90)

26. Arelma never had any assets except for the Merrill Lynch account and a small account at Swiss Bank Corporation. (Sunier Dep. 92)

27. Arelma never maintained an office or place of business, and used a Swiss address (Swiss Bank Corporation and later Suntrust) as an address for mail. (Ex. 10, 21)

28. Arelma never paid taxes to any taxing authority other than Panama, and that related solely to the fee for Arelma's continued incorporation. After 1983 these were paid by Suntrust for which it was reimbursed by transfers from Arelma's account at Merrill Lynch. (Ex. 25, 26, 30)

29. In 1987 a New York Federal court in the case of *Republic of the Philippines* v. *Ferdinand E. Marcos* froze the Arelma account at Merrill Lynch. (Ex. 23; Sunier Dep. 81) No claim of sovereign immunity was made in that case freezing the Arelma account.

30. The Swiss Federal Supreme Court has twice held that Ferdinand E. Marcos controlled Arelma and that Marcos had the power of disposition over Arelma. Arelma was a party in both proceedings and represented by legal counsel. (Ex. 47 at A14 and Ex.48 at C17)

31. In 1997 Imelda Marcos engaged John Burns, a banker, to try and recover the assets in the Merrill Lynch account on behalf of the Estate of Ferdinand E. Marcos. Imelda Marcos and Ferdinand R. Marcos, as executors of his Estate, executed powers of attorney to Burns for this purpose, and he made a demand on Merrill Lynch to release the assets. (Burns Dep. 21-23; Ex. 28 and 29)

32. Sunier's power of attorney expressly included the duty to appear and act on behalf of Arelma in legal proceedings. (Ex. 46) In 1997 Sunier acknowledged in a signed statement to Swiss authorities that the formation of Arelma in September 1972 was part of a new relationship with Ferdinand Marcos. He acknowledged that he held the Arelma share certificates and was the only person in contact with the Marcos family. (Ex. 29)

33. Suntrust and Sunier have admitted that Arelma was incorporated to receive funds owned by Ferdinand Marcos, and that Marcos controlled Arelma during his lifetime. (Ex. 44; Sunier Dep. 46-47) Upon Marcos death that control passed to his Estate.

34. The abuse committed against Plaintiff Pimentel by the Philippine military is illustrative of the claims of the class he represents. Pimentel was arrested two weeks after the declaration of martial law. During the next six years he was held in detention centers for four years with no charges against him. On his trip home from his final detention, the military kidnapped him. They beat him with rifles breaking his teeth, an arm and a leg, and dislocating ribs. They then took him to a remote sugar cane field, buried him up to his neck and left him for dead. (Pimentel Dep. 84-85 and 93-94)

35. The class of Filipino Judgment Creditors in MDL No. 840 has a Final Judgment entered February 3, 1995 against the Estate of Ferdinand E. Marcos in the principal amount of $1,964,005,859.90 plus interest at the rate allowed by 28 U.S.C. §1961 which has not been satisfied. (Jt. Pretrial Stip.)

36. The class of Filipino Judgment Creditors in MDL No. 840 has a contempt award against Imelda R. Marcos and Ferdinand R. Marcos, personally, in the amount of $100,000 per day which had been running since June 30, 1995, and which has not been satisfied. (Jt. Pretrial Stip.)

37. Neither Golden Budha Corporation nor Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against the Estate of Ferdinand E. Marcos. (Jt. Pretrial Stip.)

38. Golden Budha Corporation has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of $13,275,848.37 as of October 21, 1996. (Jt. Pretrial Stip.) This claim, if any, is junior to the claim of the class of Filipino Judgment Creditors in MDL No. 840.

39. Felix Dacanay, as personal representative of the Estate of Roger Roxas, has a judgment against Imelda Marcos in her personal capacity to the extent of her interest in the Estate of Ferdinand E. Marcos in the principal amount of $6 million as of October 21, 1996. (Jt. Pretrial Stip.) This claim, if any, is junior to the claim of the Filipino Judgment Creditors in MDL No. 840.

40. PNB, as an escrow agent, holds the two bearer share certificates owned by the Estate of Ferdinand E. Marcos, issued by Arelma pursuant to an Escrow Agreement dated August 14, 1995 between PNB and the PCGG. (Jt. Pretrial Stip.)

41. The two Arelma bearer share certificates owned by the Estate of Ferdinand E. Marcos were delivered to PNB by the PCGG which obtained them from the Swiss government.

(Jt. Pretrial Stip.)

42. Suntrust Investment Co. has disclaimed any interest in the interpleaded assets. (Jt. Pretrial Stip.)

43. Pursuant to the Swiss Closing Order, the Arelma bearer share certificates were subsequently returned to the Philippines and since on or about July 28, 2000, have been in the possession of and held by PNB, as escrow holder, according to the Arelma Escrow Agreement.

44. On or about November 20, 2000, the Board of Directors of Arelma held a special meeting at which the Board of Directors granted a general power of attorney in favor of PNB to represent Arelma in seeking the transfer of the assets in the Arelma Account to PNB as escrow holder. (Trial Exhibits 125 and 136) There is no evidence that the Board of Directors was duly elected and acting for Arelma S.A. owned by Ferdinand Marcos.

CONCLUSIONS OF LAW

1. Pursuant to 28 U.S.C. §2361 interpleader is a hybrid civil action in which there is no defendant upon whom liability can be claimed. There are only claimants invited, not summoned, to make a claim against the interpleaded fund.

2. This Court has jurisdiction pursuant to 28 U.S.C. §1335 since two or more of the claimants are of diverse citizenship and the amount at issue has been deposited with the Clerk of the Court. Jurisdiction also exists pursuant to 28 U.S.C. §1655 and the doctrines of *quasi in rem and in rem* jurisdiction. Jurisdiction was perfected when the plaintiff deposited the assets at issue with the Clerk of the Court.

3. Venue is based upon 28 U.S.C. §1397 since two of the claimants, Pimentel and PNB reside in Hawaii.

4. Arelma was properly served pursuant to FRCP Rule 4(k)(l)(C) which provides for nationwide service of process: "Service of summons is effective to establish jurisdiction over the person of a defendant [claimant] ... who is subject to the Federal interpleader jurisdiction under 28 U.S.C.

§1335..." *See Rubinbaum* v. *Related Corporate Partners V*, 154 F.Supp.2d 481, 486 (SDNY 2001).

5. Minimum jurisdiction contacts are satisfied for purposes of personal jurisdiction over Arelma, Inc. since it had a multi-million dollar trading account at Merrill Lynch in New York between 1972 and 2000. *See SIPC* v. *Vigman*, 764 F.2d 1309, 1315-16 (9th Cir. 1985).

6. Because this Court has Federal subject matter jurisdiction based on the Federal Interpleader Statute, 28 U.S.C. §1335, and *in rem* jurisdiction under 28 U.S.C. §1655, federal substantive law applies, although a Federal court may look to state law for guidance. *Board of Trustees* v. *Valley Cabinet & Mfg. Co.*, 877 F.2d 769, 772 (9th Cir. 1989). In this case, New York has the most significant contacts to the interpleaded assets.

7. It would be contrary to the public policy of the United States to apply the law of Panama when, based on Arelma's contention, Panamanian law precludes use of the *alter ego* doctrine among private parties. See *First National City Bank* v. *Banco Para el Comercio Exterior*, 462 U.S. 611, 621 (1983) ("As a general matter, the law of the state of incorporation normally determines issues relating to the *internal* affairs of a corporation. Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. Different conflicts principles apply, however, where the rights of third parties *external* to the corporation are at issue. To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result" [citations and footnotes omitted]); *Itel Containers International Corp.* v. *Atlanttrafik Express Service Ltd.*, 1988 U.S.Dist. LEXIS

7051 at 12 (S.D.N.Y. 1988); *Marlowe* v. *Argentine Naval Commission*, 604 F.Supp. 703, 705 (D.D.C. 1985); *Edwards* v. *Schillinger*, 245 Ill. 231, 91 N.E. 1048, 1053 (1910) (term "internal affairs" does not extend to cheating creditors, but must be confined to relations affecting only stockholders and corporation among themselves).

8. Under federal common law, a corporation's veil may be pierced based upon three factors:

a) the amount of respect given to the separate identity of the corporation by its shareholders;

b) the degree of injustice visited upon the litigants by recognition of the corporate entity; and

(c) the fraudulent intent of the incorporators.

Board of Trustees v. *Valley Cabinet & Mfg. Co.*, *supra*. For a party to prevail, he must satisfy the first prong and either the second or third prong. *UA Local 343* v. *Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1475 (9th Cir.), cert. denied, 133 L.Ed.2d 203 (1995). Piercing of the corporate veil is an equitable remedy addressed to the discretion of the court. *McClaran* v. *Plastic Industries, Inc.*, 97 F.3d 347 (9th Cir. 1996). The law of New York is similar to Federal law on this subject. See *Goya Foods, Inc.* v. *Unanue*, 233 F.3d 38, 43 (1st Cir. 2000) (applying New York law). New York law, like Federal law, permits "reverse piercing" of the corporate veil. *Id.*

9. PNB, as escrow agent for the parties claiming ownership of the Arelma share certificates, lacks standing to seek ownership of the proceeds of the Merrill Lynch account which was maintained in the name of Arelma., Inc. See *Dole Food Co.* v. *Patrickson*, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003) (A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. An individual shareholder, by virtue of ownership of shares, does not own the corporation's assets..."). Moreover, Arelma itself is a party actively seeking control of the assets at issue.

10. Arelma and PNB are collaterally estoppel from de-

nying or opposing the findings of the Swiss Federal Supreme Court that Ferdinand Marcos controlled Arelma. (Lebrecht Dep. 27-31)

11. The Marcoses had a highly developed and sophisticated pattern and practice of concealing and secreting their assets by various methods, including aliases and shell corporations. See *Hilao* v. *Estate of Ferdinand Marcos*, 25 F.3d 1467, 1480 (9th Cir. 1994); *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir. 1988); and *Republic of the Philippines* v. *Marcos*, 806 F.2d 344 (2nd Cir. 1986).

12. The purpose of incorporating Arelma was to receive funds owned by Ferdinand E. Marcos, and there is no evidence the funds deposited in the Arelma account at Merrill Lynch were not the property of Ferdinand E. Marcos.

13. Arelma was controlled by Ferdinand E. Marcos or his representatives during his lifetime.

14. Arelma served no legitimate purpose other than to hide the assets of Ferdinand E. Marcos.

15. There was complete disregard of Arelma's corporate identity by everyone who dealt with Arelma's business.

16. The sole deposit of $2 million into Arelma's Merrill Lynch account in November 1972 coincided with Marcos' declaration of martial law and the inception of massive *jus cogens* human rights abuses for which Marcos was responsible.

17. A Class of 9,539 human rights victims (or their heirs) have a final judgment against the Estate of Ferdinand E. Marcos for almost $2 billion, plus interest.

18. It would be unjust to prevent the Class of persons tortured, summarily executed and disappeared from receiving the proceeds of the Arelma account at Merrill Lynch to partially satisfy their judgment.

19. Golden Budha and Estate of Roxas have not proved that the assets in the Merrill Lynch account derived from as-

sets allegedly stolen from them.

20. The judgments of Golden Budha and Estate of Roxas are against Imelda Marcos, not Ferdinand E. Marcos or his Estate.

21. Arelma cannot recover the proceeds of the account at Merrill Lynch since it was the *alter ego* and instrumentality of Ferdinand E. Marcos, and its claim is subordinate to the claim of the Class as judgment creditors of the Estate of Marcos.

22. Pimentel and the Class of Human Rights victims are entitled to the entirety of the interpleaded assets, and the Clerk of the Court is directed to transfer those assets to the account in the Clerk's Office established in MDL No. 840 pursuant to paragraph 10 of the Final Judgment of February 3, 1995 in that action.

Dated: July 12, 2004.

/s/
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MERRILL LYNCH, PIERCE, FENNER
& SMITH INCORPORATED,
Plaintiff,
vs.
ARELMA, INC., et al.,
Defendants.
CASE NO. CV00-595MLR

[Defendant Pimentel's Proposed]
Findings of Fact and Conclusions of
Law re Rule 19(b) Motion

Defendant Mariano Pimentel submits the following proposed findings of fact and conclusions of law in support of his position that the Court should deny the pending Rule 19(b) Motion:

1. This Court has jurisdiction pursuant to 28 U.S.C. 1335 since two or more of the claimants are of diverse citizenship and the amount at issue has been deposited with the Clerk of the Court. Jurisdiction also exists pursuant to 28 U.S.C. 1655 and the doctrines of *quasi in rem and in rem* jurisdiction. Jurisdiction was perfected when the plaintiff deposited the assets at issue with the Clerk of Court.

2. Based on the undeveloped state of the record before the Count of Appeals, it found the Republic of the Philippines and its PCGG to be necessary parties under FRCP 19(a) with regard to the claim that the monies deposited in the Arelma account at Merrill Lynch were misappropriated from the Republic. See *In re Republic of the Philippines*, 309 F.3d 1143, 1151 (9th Cir. 2002). The Court of Appeals held that the Republic and its PCGG are entitled to be dismissed

from this proceeding based on sovereign immunity, and they have been dismissed. It also found that there is no alternative forum to litigate the claims of the parties to the assets deposited with this Court. *Id.* at 1153.

3. The Court of Appeals reversed and remanded for further consideration by this Court the question of whether the Republic and its PCGG are indispensable parties within the meaning of FRCP 19(b). The parties have completed discovery; the Court reviewed testimony and documents in connection with various motions, including a motion for summary judgment; and the record now contains more information than when this Court first addressed the indispensable party issue.

4. The claim of the Republic and PCGG arises no later than 1972 when the $2 million was deposited into the Arelma account established at Merrill Lynch in New York. The Republic has been aware of the deposit since 1986 when the government of Corazon Aquino was installed. In April 1987 the United States Justice Department, acting on information from the Republic, froze the Arelma account at Merrill Lynch.

5. In December 1991 the Republic filed a Petition in the Sandiganbayan (a Philippine court) against the Estate of Ferdinand E. Marcos alleging forfeiture of certain assets held in Marcos controlled accounts in Swiss banks. There is no claim in that lawsuit seeking forfeiture of the assets in the Arelma account at Merrill Lynch.

6. On July 15, 2003 the Philippine Supreme Court ruled that the Republic was entitled to the assets in the Marcos controlled accounts in Swiss banks. Those assets had been transferred to the custody of the Philippine government's escrow agent in 1997. There is nothing in that decision which mentions Arelma or Arelma's account at Merrill Lynch or which impacts in any way on this litigation.

7. No pleading has been brought to the attention of this

Court showing that there is any legal proceeding in the Philippine courts or the courts of any other country regarding the Arelma assets deposited at Merrill Lynch. Allegations have been made that there is a legal proceeding in the Philippines to determine ownership of two Arelma share certificates transferred by Swiss authorities to the escrow agent of the Republic in 2000, but no document substantiating that has been produced even though the escrow agent, Philippine National Bank, is a party in this litigation.

8. Ownership of the Arelma share certificates is irrelevant to this proceeding since Arelma is a party actively seeking control of the assets at issue and Arelma's shareholders have no standing to pursue assets allegedly belonging to the corporation. *See Dole Food Co.* v. *Patrickson*, 123 S.Ct. 1655 (2003).

9. Any claim by the Republic or its PCGG for misappropriation of its assets would be barred by an applicable statute of limitations. The statute of limitations in New York is three years from the taking, N.Y. C.P.L.R § 203, or two years after it was discovered. N.Y. C.P.L.R. § 203. Actions against estates have to be commenced within a year of death. N.Y. CP.L.R § 210 The statute of limitations in the Philippines is four years. Civ. Code Phil. Art. 1146(2). Therefore, the Republic and its PCGG have no legally protectible interest in the assets at issue in this proceeding.

10. Parties asserting dismissal for failure to join an indispensable party bear the burden of proof that the criteria of FRCP 19(b) are satisfied. *See In re Stat-Tech Sec. Litigation*, 905 F.Supp. 1416 (D.Colo. 1995)(burden of proof is on party raising the defense).

11. Rule 19(b) of the Federal Rules of Civil Procedure is addressed to the discretion of the Court acting "in equity and good conscience" and requires a careful analysis of multiple considerations before allowing dismissal of an entire litigation for failure to join an indispensable party. "A court of eq-

uity will strain hard" to avoid dismissal. *Bourdieu* v. *Pacific Western Oil Co.*, 299 U.S. 65, 70 (1936).

12. The four factors listed in Rule 19(b) are "overlapping" and "not intended to exclude other considerations which may be applicable in particular circumstances." Official commentary on the 1966 amendment to Rule 19(b).

13. Under Rule 19(b), in order for an interest to be "impaired, it must be shown that a "necessary" party has a "legally protectible claim," not merely a potential claim. *American Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1023 (9th Cir. 2002); *Makah Indian Tribe* v. *Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

14. Expiration of an applicable statute of limitations precludes a "necessary" party from having a legally protectible Claim. *See generally Virginia Elec. & Power Co.* v. *Westinghouse Elec. Corp.*, 485 F.2d 78, 86 n.22 (4th Cir. 1973) cert. denied 415 U.S. 935; *Wheelock* v. *Sport Kites, Inc.*, 839 F.Supp. 730 (D.Haw. 1993); and *Young* v. *United Steelworkers of America*, 49 F.R.D. 74, 75 (E.D.Pa. 1969); all holding that expiration of the statute of limitations on a party's claim is relevant under Rule 19(b).

15. The claim of the Republic and its PCGG for misappropriation is not a legally protectible claim, so proceedings herein cannot impair that claim. Nor will proceedings herein impair any effort by the Republic and its PCGG to acquire the Arelma stock certificates. Neither res judicata nor collateral estoppel from rulings in this case will apply to the Republic and its PCGG since it is no longer a party.

16. The Republic and its PCGG made a strategic decision not to participate in this litigation even though they have participated in over a dozen lawsuits in the United States involving purported Marcos assets. "An absent party's opportunity to intervene may be considered in calculating the prejudicial effect to him." *Takeda* v. *Northwestern Nat'l Life Ins. Co.*, 765 F.2d 815, 820 n.5 (9th Cir. 1985). The Republic

and PCGG must accept "the disadvantages as well as the advantages that flow from" their "strategic election." *Citibank International* v. *Collier Traino Inc.*, 809 F.2d 1438, 1441 (9th Cir. 1987).

17. The defendants have no standing to participate in forfeiture proceedings between the Republic and the Marcoses in Philippine courts. The lack of an alternative forum is a significant factor to be considered under Rule 19(b). *See Provident Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 110 (1968).

18. Ferdinand E. Marcos departed the Philippines in February 1986 and died in Hawaii in September 1989. It is important to bring finality to claims against his purported assets after these many years.

19. The absence of the Republic and PCGG as parties will not prejudice any party. Any prejudice to Merrill Lynch will be mitigated by the fact that the Republic and its PCGG have no legally protectible claim; and the doctrine of prior exclusive jurisdiction that would transfer any future claim brought in a United States court against Merrill Lynch to this Court. See *Farmers Loan and Trust Co.* v. *Lake St. Elevated R. Co.*, 177 U.S. 51, 61 (1900). Merrill Lynch was aware of the dismissal of the Republic and PCGG on sovereign immunity grounds when it renewed and received an order discharging it, thereby indicating it believed any prejudice was minimal.

20. Plaintiff Merrill Lynch will not have an adequate remedy if this proceeding is dismissed since it would have to defend multiple lawsuits seeking the same relief.

21. A judgment rendered in the absence of the Republic and PCCG will be adequate.

22. The moving parties have not sustained their burden of proof.

23. Based on the above facts, equity and good conscience require that the motion to dismiss for lack of an in-

dispensable party be denied.

Dated: Aug 14, 2003.

/s/
Manuel L. Real, Judge

APPENDIX G

United States Court of Appeals, Ninth Circuit.

MERRILL LYNCH, PIERCE, FENNER AND SMITH, INCORPORATED

v.

ENC CORPORATION

[remainder of caption omitted]

Nos. 04-16401, 04-16503, 04-16538.

Nov. 3, 2006.

Before JOHN T. NOONAN, SIDNEY R. THOMAS, Circuit Judges, and JAMES L. ROBART,* District Judge.

ORDER

The panel has voted to deny the petitions for rehearing. Judge Thomas has voted to deny the petitions for rehearing en banc and to deny any further petitions, and Judge Noonan and Judge Robart so recommend.

Petitioners' fears of *res judicata* are baseless.

The Republic's claims of prejudice under Rule 19(b) are without merit, because its suit to recover the Arelma assets in the Philippines is a forfeiture action, one which a unanimous *en banc* Philippine Supreme Court has "categorically declared" is *in rem. Rep. of the Phil.* v. *Sandiganbayan*, (Nov. 18, 2003). The Republic has no jurisdiction over the *rem*, which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States. Restatement (Third) of the Foreign Relations Law of the United States, § 482(2)(a) (1987).

Petitioner also omits the crucial language in *American Greyhound*, *see* Pet. Reh'g at 6, which reads, "some courts have held that sovereign immunity forecloses in favor of

* The Honorable James L. Robart, United States District Judge for the Western District of Washington, sitting by designation.

tribes the entire balancing process under Rule 19(b), but we have continued to follow the four-factor process even with immune tribes." *Am. Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1025 (9th Cir.2002).

The full court has been advised of the petitions for rehearing en banc, and no active judge has requested a vote whether to rehear the matter en banc. Fed.R.App.P. 35.

The petitions for rehearing en banc are DENIED.

APPENDIX H

FEDERAL RULE OF CIVIL PROCEDURE 19

(a) Persons to be Joined if Feasible.

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible.

If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff

will have an adequate remedy if the action is dismissed for nonjoinder.

* * *

APPENDIX I

DIPLOMATIC NOTE FROM THE REPUBLIC OF THE PHILIPPINES TO THE U.S. DEPARTMENT OF STATE

No. WCG-023-07

The Embassy of the Republic of the Philippines presents its compliments to the Department of State, and has the honor to bring to the latter's attention the Philippine Government's position regarding the decision of the United States Court of Appeals for the Ninth Circuit in ***Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Arelma, Inc.***, 464 F.3d 885 (9th Cir. 2006), as modified on denial of rehearing by 467 F.3d 1205 (9th Cir. Nov. 3, 2006).

This decision presents a matter of the utmost concern to the Philippines inasmuch as it effectively negates any meaningful exercise of sovereign immunity and interferes with the ability of foreign nations, such as the Philippines, to proceed in their own courts with claims seeking forfeiture of assets in cases of political corruption by high government officials.

The recovery of the ill-gotten wealth of former President Ferdinand E. Marcos is a preeminent responsibility of the Philippine Government and represents a national interest of the Republic that is of the highest order. In pursuit of that interest, the Philippines, acting through its Presidential Commission on Good Government (PCGG), has been vigorously pursuing such assets within the Philippines and through cooperative international civil and criminal enforcement efforts in various countries around the world. As part of those efforts, it has enlisted the support of the criminal and civil enforcement authorities in such countries, including through various mutual assistance treaties. These efforts are typical of those engaged in within the international community. Resort to such cooperation has often been sought by the United States in matters involving the forfeiture of property. Ensuring the effectiveness of such cooperation among friendly na-

tions in matter[s] involving the misappropriation of public assets by high-ranking former government officials is a subject of the highest importance in maintaining respectful relations among nations.

As part of these efforts, it is critically important for courts to respect the long-recognized and vital doctrine of sovereign immunity. It is equally important that sovereign nations be permitted to pursue claims seeking the forfeiture of misappropriated property resulting [from] political corruption within their own judicial systems and to have such determinations recognized and enforced by the courts and executive authorities of other nations. Both of these important principles have been called into serious question by the recent decision of the Ninth Circuit that the Philippine Government now respectfully brings to the attention of the relevant authorities of the United States Government.

The Philippine Government therefore intends to request a review by the United States Supreme Court of this decision and earnestly seeks the assistance of the Department of State in supporting that request by encouraging the Solicitor General to file a brief *amicus curiae* in support of the Philippine Government's Petition.

In this connection, the Embassy has the honor of enclosing, as part of this Note, a background paper which describes in detail the issues involved in the case and the Philippine Government's position therein.

The Philippine Government is of the view that the United States Government's support on this matter would be consistent with the spirit of mutual friendship and robust cooperation which characterizes the relationship between the two countries, and would serve as the latest demonstration of reciprocal goodwill between both Governments.

The Embassy of the Republic of the Philippines avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,
5 February 2007